

228 d. 4

R E P O R T S

OF THE
PROCEEDINGS IN COMMITTEES
OF THE
HOUSE OF COMMONS,
UPON
CONTROVERTED ELECTIONS,

HEARD AND DETERMINED DURING THE
PRESENT PARLIAMENT.

V O L. II.

Containing the Proceedings on PETITIONS in the CASES of

LYME,
SALTASH,
NEWPORT,

|| CRICKLADE,
|| BEDFORDSHIRE, (1785)
|| BUCKINGHAMSHIRE.

Together with an INDEX to the CONTENTS of both VOLUMES.

BY ALEXANDER LUDERS, ESQ.

BARRISTER at LAW, of the INNER-TEMPLE.

L O N D O N;

SOLD BY EDWARD BROOKE, THOMAS WHIELDON,
AND JOHN DEBRETT.

APRIL, MDCCCLXXXIX.



C O N T E N T S.

C A S E VIII.

	Page
BOROUGH of LYME - - -	I
NOTES on that CASE - - -	95

C A S E IX.

BOROUGH of SALTASH - - -	107
NOTES on that CASE - - -	226

C A S E X.

BOROUGH of NEWPORT - - -	269
NOTES on that CASE - - -	308

C A S E XI.

BOROUGH and HUNDREDS of CRICKLADE	323
-----------------------------------	-----

C A S E XII.

COUNTY of BEDFORD in 1785 - - -	381
NOTES on that CASE - - -	570

C A S E XIII.

COUNTY of BUCKINGHAM - - -	599
APPENDIX - - -	605

ERRORS

ERRORS OF THE PRESS, AND OMISSIONS.

Page

- 28, line 13, read *per presentes*.
30, line 12, read *occasioned* an *observation*.
33, line 3, of the note, read *Commons' journal*.
58, line 2, read *freemen*;
167, line 1, for *election* read *electd*.
179, line 22, read (C.) instead of (D.)
199, note, for *bailiffs* read *burgesses*.
202, line 17, read *stated in*
231, line 8, read *member*.
243, line 11, read *in eorum*.
249, line 21, read *several*.
417, line 25, read *this* description.
420, line 2, read *the* evidence.
482, in the note, read 1 *Hen. V.* and 8 & 23 *Hen. VI.*
502, Fill the blank reference in the note with *p. 521*.

After the case of T. Kidman, in p. 447, add a reference to
the case of John Creaker in p. 603.

In p. 319, add a note of reference to *Bird* and *Smith's* case,
Moore Rep. 783.

DIRECTIONS TO THE BINDER.

Place the Paper intituled *Copy of the Poll*, so as to
front p. 157; and the Paper intituled *Saltafs*
13th April 1722, to front p. 211.

VIII.

THE

C A S E

OF the BOROUGH of

L Y M E,

In the County of DORSET.

Vol. II.

B

The Committee was chosen on Tuesday the 15th Day of February, 1785, and consisted of the following Members:

Hon. John Charles Villiers, *Chairman.*

Penystone Portlock Powney, Esq;

Richard Aldworth Neville, Esq;

Charles Brandling, Esq;

Sir John Wodehouse, Bart.

Sir Robert Salusbury Cotton, Bart.

Hon. Chapple Norton.

John Call, Esq;

Jeremiah Crutchley, Esq;

David Murray, Esq;

Lord Apsley.

Gabriel Steward, Esq;

George Sutton, Esq;

NOMINEES.

Charles Robinson, Esq; *Of Petitioners.*

Bamber Gascoyne, Esq; *Of Sitting Members.*

PETITIONERS.

Robert Wood, and John Cator, Esquires, and certain Freeholders of the Borough; by separate Petitions.

Sitting Members.

Hon. Henry Fane, and Hon. Thomas Fane.

COUNSEL.

For the Candidates Petitioners,
Mr. Wilson, and Mr. Lawrence.

For the Electors Petitioners,
Mr. Batt. (A)

For the Sitting Members,
Mr. Serj. Rooke, and Mr. Partridge.

(3)

T H E
C A S E
Of the BOROUGH of
L Y M E.

THE petition of the candidates stated, That at the election, a great majority of legal electors appeared in favour of the petitioners, and that the returning officer acted with great partiality in favour of the sitting members, and admitted many illegal votes for them, and rejected many legal votes tendered for the petitioners, under colour whereof the sitting members gained their apparent majority, although the petitioners were duly elected, and ought to have been returned. There was also a charge of bribery against the sitting members *.

The petition of the electors alledged, that none but persons resident ought to have been admitted to vote, and that the returning officer, by receiving the votes of others, and rejecting those of freeholders who had a right to vote,

* Votes, p. 25, 28th Jan. 1785.

had given an illegal majority to the sitting members, in violation of the rights of the legal electors of the borough; a majority of whom had chosen the other candidates*.

The present contest is the second which has occasioned the right of election in this borough, to be discussed before a select committee. The first happened upon the general election in 1780, the merits of which were tried in february 1781; after a previous determination by a former Committee, upon the merits of a double return, in which the cause was at first involved †.

The claims of each party were the same in both trials: one side contending for a right of election in the members of the corporation, generally: the other for a right in the freeholders of the borough as well as in the corporators; superadding to both, the qualification of residence. The petitioners in both contests were those who supported the latter claim. The former Committee determined in favour of the sitting members, and declared the right of election to be "in the freemen only, as well non-resident as resident."

* Votes, p. 26.

† An account of this cause is in print, and makes one of the four election cases published by Mr. Philips. See 38 Journ. 12, 13, 95, 108, 273.

There is no resolution of the House upon the right of election in this borough; though its contested elections have at different periods been determined there. At the last election, the returning officer proceeded according to that right which had received the sanction of the former Committee. The state of the poll was,

For the sitting members, 31

For the petitioners, 8

—

Majority 23

Fifty-five persons claiming to vote as freeholders and inhabitants, had tendered their votes for the petitioners, and were rejected by the mayor.

The counsel for the petitioners in opening their case, stated it to consist of two propositions, to establish which their whole evidence would be directed.

First, That the right of voting for Members of Parliament in Lyme, can be exercised by none but inhabitants.

Secondly, That freeholders of the borough (subject to the former limitation) have also that right as well as the freemen.

The establishment of either of these points would have given success to the petitioners; because it was admitted by the sitting members, that 26 of their votes were not inhabitants: And

if the freeholders should be considered to have a right, they would add still more to the petitioners' majority.

The sitting members did not require proof of the titles of the rejected freeholders, but allowed them *de bene esse* till after the decision of the Committee upon the questions of right. The petitioners said, they had no evidence to offer of bribery, and therefore withdrew that charge.

The evidence on both sides was drawn principally from the returns to parliament, and from old books, and other instruments belonging to the Corporation. On the part of the petitioners it consisted of the following articles :

The charter of Edward the first to the men of Lyme, (who at that time belonged to the demesne of the crown) in these words * :

“ Rex omnibus ad quos, &c. salutem, SCRIP-
TIS quod volumus & concessimus pro nobis
& heredibus nostris, quod villa nostra de Lyme
in comitatu Dorset de cetero liber burgus sit.
Et quod homines ejusdem villæ liberi sint bur-

* At the time of Domesday it did not belong to the crown. It is entered in that book in three different places: one part of it belonging to the bishopric of Salisbury, another to the abbey of Glastonbury, and the other to an officer of the king's household, who is there named. See *Domesday* in DORSET. The charter of Elizabeth recites, that it was of the Antient Demesne of the crown.

genes,

genes, ita quod gildam habeant mercatoriam, cum omnibus ad hujusmodi gildam spectantibus in burgo prædicto. Et alias libertates & liberas consuetudines per totum regnum & potestatem nostram quas burgensibus nostris de Melcumbe per cartam nostram nuper concessimus & quibus cives nostri de London' per cartas progenitorum nostrorum quondam regum Angliæ de rebus & mercandis suis rationabiliter usi sunt hucusq; sine occasione vel impedimento justiciariorum vicecomitum ballivorum seu ministrorum nostrorum quorumcunque in perpetuum: Precipientes & firmiter injungentes pro nobis & heredibus nostris, ne quis ipsos in personis vel rebus suis contra libertates & liberas consuetudines prædictas gravet aut disturbet in aliquo vel molestet. In cujus, &c. T. R. apud *Kaer in Arvon*, 3^o die Aprilis*.”

To establish the first point, the necessity of residence, they produced the following indentures of returns to parliament.

1^o. Mariæ (the oldest extant) which is, by “the mayor and burgeses, with the inhabitants,” witnessing, that “the said mayor, burgeses, and inhabitants aforesaid, by one assent and consent,

* In the margin of the record of this charter (Pat. 12 Edw. I. m. 14) are these words: “Pro hominibus de Lyme quod villa sua liber burgus sit, & ipsi liberi burgeses, &c.”

have elected, &c." In witness whereof, the said mayor, burgeses, and inhabitants, affix the common seal.

1 Eliz. By "the mayor and the burgeses, inhabitants."

26 Eliz. By "the mayor, the burgeses, and inhabitants."

30 Eliz. By "the mayor and the burgeses, for and on the behalf of them, and of all the inhabitants and commonalty." In witness whereof they set their seals. But the instrument has not now any seal extant.

8 Cha. II. By "the mayor, and (*others by name*) burgeses, and inhabitants."

10 Will. III. By "the mayor, capital burgeses, freemen, and freeholders, *being* † *all inhabitants*."

12 Will. III. By "the mayor, capital burgeses, and freemen, inhabitants."

13 Will. III. By "the mayor, capital burgeses, and freemen, *being* † *all inhabitants*."

1 Anne. By "the mayor, capital burgeses, and freemen, inhabiting within the said borough."

4 Anne. In the terms of that next preceding.

7 Anne. In the same terms.

† The words in Italics are interlined in the originals. The counsel for the sitting members said, they did not object to these interlineations as being a forgery.

9 Anne.

9 Anne. By "the mayor, capital burgesſes, freemen, and freeholders, *inhabiting within the ſaid borough* *, who, according to the antient laws and cuſtoms of the ſaid borough, of right claim to chooſe, &c."

12 Anne. By "the mayor, capital burgesſes, freemen, and freeholders, *inhabiting within the ſaid borough* †."

1 Geo. I. By "the mayor, capital burgesſes, freemen, and freeholders, being all inhabitants of the ſaid borough, who, according to the cuſtom of the ſaid borough, of right claim to chooſe, &c."

In all the above returns, *inhabitants* are expreſſly deſcribed as voters: In thoſe following, the term is not uſed; but they were produced, in order to ſhew the names ſigned to them, and to connect thoſe names with evidence from the borough books, and other papers, tending to prove, that the perſons bearing them, were at the time of voting, inhabitants of the town. Theſe were,

A return in 1597, 39 Eliz. ſigned by ten perſons.

Four returns by "the mayor and burgesſes," in the reigns of James I. and Charles I. one of

* Theſe words in Italics are interlined in the original; and notice is taken of it in the execution as being previously done,

† See the note in the oppoſite page.

which,

which, dated in 1 James I. was signed by six persons; one in 21 James I. by seven; one in 1 Charles I. by four; and one in 3 Charles I. by eleven.

Three returns in the reign of Charles II. by "the mayor and burgeses, all freemen;" one in the thirtieth year of his reign, signed by forty five persons; one in the thirty-first, by eight; and one in the thirty-third, by eight.

A return in 1 James II. in the same terms, signed by twenty-six.

A return in 2 Will. and Mary, by "the mayor, capital burgeses, freemen, and freeholders," signed by twenty-five.

The names affixed to this set of returns, were examined with the contemporary evidence above-mentioned; from whence it appeared, that such persons had been in situations which generally require residence; as serving upon the leet juries; holding town or parish offices; being presented at the leet as resiants; sworn as decennars; persons, 12 years old, swearing fealty; being described "*of Lyme*," or buried in the town. But in these instances the times did not always correspond: In one, there was a space of 57 years between the two periods, of connection; in another, 25 years; and in a third 21, besides several others of a considerable number of years.

The following entries were read from the Corporation books :

An entry in the hustings book of May 14, 1706, of the election of the members of parliament, by " the mayor, capital burgesſes, and freemen, commorant and reſident in the ſaid borough, then and there preſent, having right of election."

An entry without date in the ſecond page of the hustings book, of the period extending from 1698 to 1723, of two proclamations, to be uſed at the election of members of parliament. By the firſt, the officer is to proclaim, " If any more freemen, inhabiting in this borough, have not yet given their voices, let them come in, and their voices ſhall be received." The ſecond, to be uſed at the concluſion, is as follows: " I do, on behalf of Mr. Mayor, and the capital burgesſes, and in the name of the freemen inhabiting in this borough, proclaim, publiſh, and declare, that A. B. and C. D. are duly elected."

The oath taken by the freemen, at their admiſſion, was read, in order to ſhew that the burgeſſhip was intended for inhabitants only. The words are, " You ſhall be contributory to all manner of taxes, charges, rates, and impoſitions, within the ſaid town made, and to be made, by the mayor and his brethren, or the
moſt

most part of them, bearing your part according to your power. You shall colour no foreigner's goods: You shall know no foreigners to buy or sell any merchandize with any other foreigners within the said town or liberties thereof, but you shall warn the mayor thereof, or his brethren, or some of them. You shall know no gatherings, conventicles, or conspiracies, made against the king's peace, &c."

This oath was contrasted with another, which one of the books called the *honorary* freemens' oath, which contains only the general terms of "acknowledging to be a freeman, and bearing the love and affection of a freeman to the town." It appeared, that the latter oath had been taken by a lord-lieutenant of the county, (the entry of which was without a date) and by some gentlemen not inhabitants of the town, who were made honorary burgeses in 1700. The duke of Bolton was one of this number.

An entry in the hustings book of 1716 was read, stating the admission of some persons to be freemen, who "took the oath of honorary freemen."

Parole evidence was also given upon this point of residence, which I shall relate with that of the same witnesses concerning the claim of the freeholders.

Upon

Upon this second point, relating to the right of freeholders, the petitioners produced the following evidence. They endeavoured to shew, that the word *burgensis*, in its application to the corporate privileges of Lyme, was used in the antient records of this borough as synonymous to *liber tenens*, and distinct from a freeman of the corporation. For this purpose they read an antient resiant roll*, dated 29th of Sept. 19 Eliz.† containing a list of the inhabitants, described in three classes, in the following terms, viz.

“Burgus de Lyme *Regis*.

“Nomina omnium inhabitantium villæ ibidem tam burgensium & liberorum hominum quam aliorum ejusdem villæ renovata, 29 Sept.”

In the class intituled, “Burgenses sive liberi tenentes,” are the following names: Elizabetha filia Thomæ Hyatt, Crispina Bowden vidua, Alicia Toller vidua, Rob. Davie, Will, Elsdén, and the names of several other men.

In the class intituled, “Liberi homines,” are among others, the names of *Rob. Davie*, *Will. Elsdén*, and five more of the names before classed, as “Burgenses.”

* It was usual, at this period, for the officers of a court leet to keep a list of all persons bound to attend there, which, probably, was the occasion of making this roll.

† 1577.

In the class intitled, "Inhabitantes generaliter," is a very numerous list of names.

A book intitled, "The book of the freemen of Lyme Regis," beginning in 1569, contained entries of different dates subsequent to 29 Sept. 19 Eliz. 1577, (the date of the roll) of admissions of six of the persons named in the first class, to the freedom of the town; of four of these, "by buying the freedom." Hence it was inferred, that they could not have been *freemen* before, although they were *burgenses*.

Another resiant roll was read, having the same title as the former, dated 18 Dec. 21 Eliz. 1579. This roll seemed to have contained, originally, the same division of the inhabitants, into three classes, as the former; but, at present, only two appear to have been expressed; of which the first are called, "Liberi burgenses," and the second, "Liberi homines;" the third seemed to have been composed of the "alii homines."

Two of the names of this roll (not in the former) were traced in the same manner as the others, to entries in the freemens' book, of their being admitted freemen subsequent to the date of the roll, in which they are described as *liberi burgenses*. These two have added to their names the words "jure uxoris."

In

In this roll are sixteen names (chiefly the same as in the former) under the class of *liberi burghenses*, all of which, except that of Alicia Toller, are again entered under the class of *liberi homines*.

Having given this evidence to explain the meaning of the terms, they proceeded to shew that the right of voting for members of parliament had been exercised by freeholders, by

An entry in a corporation book, dated Dec. 30, 1609, containing the names of the voters present at an election of that time: The stile of the return is "by the mayor and burghesses;" the words of the entry are "Voices to the elections of the burghesses of parliament." Then follow twenty-four names, each twelve being distinguished by a circumflex: Among them are Geo. Pley, Anthony Elsdon, W. Legge, and Thomas Samford.

By the resiant rolls of 1598, and 1611, Geo. Pley appears to have been then a freeholder; by the freemens' book Geo. Plea, *junior*, is first admitted a freeman in 1612.

In the same resiant roll of 1598, "the heirs of William Elsdon" are named among the freeholders; and in 1610, Anthony Elsdon is named as such: He is admitted a freeman in 1611.

In 1579, William Legge appears to be a freeholder, in right of his wife. An agent of the petitioners, who was examined, had looked over
all

all the entries extant of admissions prior to the date of this election, and could not find any person of this name to have been then a freeman. He said the same of Thomas Samford, who is named among the freeholders in 1609; and in 1613 his *heirs* are in the list.

The same gentleman said, that a man might have been a freeman before the year 1569, without any trace of his admission to be found in the books, because the freemens' books, now extant, begin with that year. That the hustings books often shew the names of freemen which are not to be found in the freemens' books, and *vice versa*. That the hustings books, from 1584 to 1591-2 of part of 1602-3, from 1607 to 1614, from 1626 to 1646, and from 1710 to 1713, are missing.

The names of three persons are signed to the return of Aug. 11, 1656, 8 Charles II. two of whom appear to have been freeholders in 1660, and all three in 1661. No entry can be found of their being freemen.

In the hustings book of 21 March, 1613-14, it is entered, that "this day the freemen and freeholders did choose Mr. Recorder, and Mr. John Drake, gent. to be burgeses of the parliament." On the 22d of February, 1680-1, is the entry of an election to parliament "by the mayor, capital burgeses, *and freemen*, with one assent and consent,
without

without the least contradiction of any other persons whatsoever within the said borough."

The return to the convention parliament, dated 11th of January 1688-9, after reciting the circular summons from the Prince of Orange, for choosing members according to the antient rights and customs, certifies, that "the mayor, burgesses, freemen, and freeholders, have chosen, &c." To this the mayor sets his hand and seal.

The return, 2 Will. and Mary, 1689, states, "that the mayor, capital burgesses, freemen, and freeholders, who, according to antient rights and customs of the borough, of right claim to choose, &c. have elected ———." Signed by the mayor and several others, with the mayor's seal of office affixed.

This election was contested by petition to the House; the proceedings upon which were read from the Journal * as follows:

"21st of May. Colonel Birch reports, from the Committee of privileges and elections, to whom the matter touching the election of burgesses to serve in this present parliament for the borough of Lyme Regis, in the county of Dorset, was referred, the state of the case, at it appeared to the Committee: Which he produced in writing; and being read at the clerk's table, is as followeth:

* 10 Journ. 140.

" Upon the petition of Sir William Drake, Knight and Bart. against John Burridge, Esq; touching the election of Lyme *Regis*, in the county of Dorset, came to be heard for the petitioner.

" That the counsel insisted, that the right of election was in the mayor, burgesſes, and free-men at large; and that Lyme *Regis* was made a borough 12 Edw. I. and at the ſame time a corporation; ſo the corporation was co-evoꝛs with the borough: And delivered in a copy of a grant

" 12 Edw. I. " Quod villa de Lyme in comitatu Dors' de cetero liber burgus ſit, & quod homines ejuſdem ville ſint liberi burgenſes ita quod habeant gildam mercatoriam."

" 12 Edw. IV. " Sub ſigillo majoris." (Return)

" 30 Eliz. Mayor and burgesſes elected.—Return, under the ſeal of mayor and burgesſes."

" 1^o and 2^o Philippi & Mariæ. Mayor and burgesſes elected—under the common ſeal.

" 16 Car. I. Major per majorem partem capitalium & aliorum liberorum burgenſium, elegit—ſub ſigillo majoris.

" 13 Car. II. Majorem cum aſſenſu reſiduoꝛum burgenſium liberorum hominum villæ prædictæ—ſub communi ſigillo.

“ 31 Car. II. 32 Car. II. Mayor and burgesſes, with conſent of the whole mind, elected —under the hands of the mayor and burgesſes, and common ſeal.

“ It appeared, upon the poll delivered in, that Sir William Drake had twenty-nine votes with himſelf, and that Mr. Burrige had thirty votes with himſelf; but it was allowed, that of the twenty-nine that voted for Sir William Drake, there were five foreign freemen, viz. Francis Alford, William Bragg, John Fry, Anthony Floyer, and Richard Henvill.

“ And they called

“ Mr. Gregory Alford, who ſaid, he had been mayor of the town anno 1663, and then came the act of regulation*; and then he called in Sir John Strode, Colonel Biſhop and others, to his aſſiſtance, and they gave their voices; and they have come in ever afterwards into the common council houſe, and voted for mayors and other officers. That Sir John Strode and Colonel Biſhop were out burgesſes, as theſe five excepted againſt are. That he remembered Sir John Strode and Colonel Biſhop have been at the election of parliament men; and, to the beſt of his remembrance, have voted in the elections of parliament men; and particularly at the elec-

* Stat. 13. Cha. II. ſtat. 2, ch. 1.

tion of the Lord Clarendon*. That several freeholders have come and claimed their votes, but never were admitted nor returned : That he believed particularly, when the sitting member, Mr. Burrige, was mayor, the freeholders were rejected ; and that Mr. Burrige made a return by the mayor, burgeses, and freemen. That whosoever are free of Lyme, are free from many tolls at Bristol, and enjoy several privileges there : But says, the foreign freemen take not the same oath with the other. That it appeared, that the charter of Lyme *Regis* had been surrendered to the king.

“ And it was agreed, Those acts that were done under the new charter, to be void ; and thereupon the counsel for the petitioner produced the surrender of the charter of the 20th of October 1684. And called

“ One Bragg, a witness, who said, That Thomas Pitts, Thomas Fitzgerrard, and Robert Fowler, who polled for Mr. Burrige, were made free under the new charter, viz. Thomas Pitts, 2d of March, 1684 ; Thomas Fitzgerrard, 5th of October, 1685 ; Robert Fowler, 4th of February,

* At that time Mr. Hyde. This happened in the restoration year, upon a vacancy occasioned by Mr. Moore's choosing to serve for Heytesbury, he having been elected for that place as well as Lyme. 8 Journ. 25.

1687: That James Pitts, another person that voted for Mr. Burrige, was a freeman by the old charter, but disfranchised for some misdemeanor, and restored by the new charter. He was disfranchised in a full corporation, for bringing in several things contrary to his oath. That John Cafe and Matthew Sprag are freemen of the town of Lyme, but both live out of the town; one six miles, the other two.

“ For Mr. Burrige: That the counsel insisted, that the right of election consisted in all freemen of Lyme, being inhabitants, and freeholders of the same.

“ The counsel for the petitioners granted, if the freeholders had a right, Mr. Burrige was elected.

“ Then the counsel for Mr. Burrige produced returns.

“ 1 Eliz. Mayor, burgeses, and inhabitants, elected—under the seal of the mayor and burgeses.

“ 1 Mariæ. Mayor, burgeses, with inhabitants, elected—under the common seal.

“ 13 Car. II. Produced also by the petitioner; and called.

“ John Davis; who said, he had known Lyme from a child; and that freeholders had given their vote; particularly Thomas Bragg, William Trickey, — Short, and — Mincent, gave their vote, as he thinks, at the election of Esquire

Henley and Sir John Shaw; but says, he never knew any freeholders, or freemen, out of the town, admitted to vote.

“ Mr. Short being called, exception was taken to him as being a freeholder; but, afterwards, allowed to be a witness as to the right of foreign freemen; and said, he never knew any honorary freeman demanded to vote till the last election.

“ George Brayholt said, he had known several elections of Mr. Henley and others; and that freemen and freeholders have their votes: That Squire Henley made several freeholders to that purpose: That no out-lying freemen had a vote to his knowledge.

“ Tytherly said, he had been a freeman twenty years, and that he has known some freeholders come and claim their right at elections; and they used to cry, “ Up with them.”

“ James Pitts said, he knows Sprag very well; and that Sprag had a house in the town that paid to the poors' rate: That John Case traded as a merchant in the town; but his mother-in-law dying, he was gone to take possession of the estate: That Thomas Pitts was made a freeman by the new charter: And it being said he was not a freeman, he came to the corporation and desired to have his fine, or be re-admitted; and the corporation told him, there was no need; he was a good freeman,

Upon

“ Upon the whole matter, the Committee came to several resolutions, which he read in his place; and afterwards delivered the same in at the clerk’s table, where the same was read, and is as followeth :

“ Resolved, that it is the opinion of this Committee, That John Burrige, Esq; is not duly elected a burges to serve in this present parliament for the borough of Lyme *Regis*, in the county of Dorset.

“ Resolved, That it is the opinion of this Committee, that Sir William Drake, Knight and Bart. is duly elected a burges to serve in this present parliament for the borough of Lyme *Regis*, in the county of Dorset.

The first of the said resolutions being read a second time, the question was put, that the house agree with the Committee therein. The house divided.

Tellers of the Yeas,	{ Sir Robert Cotton,	
	{ Mr. Brewer,	82

Tellers for the Noes,	{ Sir John Guise,	
	{ Mr. Conninsby,	121

So it passed in the negative.”

After the above entry was read, the petitioners called three witnesses to shew the reputation of the inhabitants as to their claim. Their names were Harris, Bowdidge, and Jurdan. The two first were 74 years of age, and the other 64.

The counfel said, that four or five old men, who had been examined before the laſt Committee, and whoſe evidence would have confirmed the others, had died ſince.

Theſe witneſſes were inhabitants of Lyme, where they had lived almoſt all their time. They ſaid, it was the common reputation there, that the right to chooſe members was in freeholders having proper land in the town, and freemen; and that they muſt all be inhabitants. When they were young they had heard old men ſay ſo; ſome of whom were capital burgeſſes *. Harris ſaid, that the votes of non-reſidents had often been reſuſed; but, however, he believed *ſome* had always voted ever ſince he could remember. The other two witneſſes believed, that no non-reſidents had voted before 1734, at which time Mr. Scroope became member. Jurdan had heard Mr. Scroope himſelf formerly ſay, that non-reſidents had no right; and conformably to this opinion, ſome time before his election, he had deſired the witneſs's father, who was a free-man in his intereſt living a mile out of the town, to remove his family into it before the election; becauſe his vote would otherwiſe be re-jected. With this requeſt his father complied ſome months before that election.

* This corporation conſiſts of a mayor and 15 capital burgeſſes, and an indefinite number of freemen.

Theſe

These witnesses were questioned as to particulars of the elections in 1727 and 1747, which were the only two contested since that in 1722; and gave the following account of them.

Harris and Bowdidge remembered both; but the latter had only lived two years in Lyme in 1727, being then not 17 years old. At the election in that year, Burrige and Drax, and Crefner and Henley, were candidates. Harris said, that freeholders were then canvassed, and on the election day went up to the hall; but he could not name any in particular who had been canvassed, nor by whom. Bowdidge said, that Burrige canvassed the freeholders, and named two in particular; but one of them he knew to be a freeman also: He did not know that these men had been canvassed but by hearsay. Burrige was then mayor, and at the poll rejected the votes of freeholders, and returned himself upon the votes of freemen only. Harris's father was then a freeholder. After that election, there was a feast for the freeholders' sons, at which the witness was present. There were 46 names signed to the return of this election, of whom Bowdidge remembered all but six to have been inhabitants of Lyme. One of the six, a Mr. Oke, he did not remember; but the family resided at Whitlands, near two miles off. Some of the 46 he knew to be both freemen and freeholders.

holders: Jurdan remembered three of these six to have been inhabitants of Lyme; but Oke, he said, lived at Whitlands.

In the entry of Oke's admission, it is said he took the oath of *honorary* freemen.

At the election in 1747, Scroope, Henley, and Drax, were candidates. Drax stood on the right of freeholders, most of whom supported him, and met for that purpose at the house of one Tucker, who acted for him in his canvas. Before the election, Drax declined, and left the town; so that there was no effective contest: Yet, according to Jurdan's evidence, he would have had a majority if he had stood a poll. This witness said, there were then about 60 freeholders in Lyme. Bowdidge said, that Henley also had canvassed the freeholders; and Jurdan had heard him before that time say, "they had a better right than freemen." Henley was then recorder, and both a freeholder and freeman. Harris remembered one Hooper's buying a freehold house previous to this election, in order to make himself of consequence in it; and upon Drax's going away, his disappointment became a subject of laughter among his acquaintance.

The petitioners produced an antient survey of this borough, in 1594; in which mention is made of a considerable number of burgages (about 50 in all) held of the corporation, specifying the
tenants

tenants and their rents. The corporation hold of the crown.

The foregoing is a state of the whole evidence produced by the petitioners.

The evidence on the part of the sitting members was directed, in the first place, against the claim of the freeholders as following:

Returns in which neither *inhabitants* nor *freeholders* are mentioned, viz.

1 and 2 Phil. and Mary. By "the mayor and burgesſes." 2 and 3 Phil. and Mary, in the ſame form. So in 4 and 5 Phil. and Mary. 14 Eliz. 28 Eliz. 39 Eliz. 1 James I. 18 James I. 21 James I. 1 Charles I. *April*, 1 Charles I. 3 Charles I. and 15 Charles I. Some of which are under the common ſeal, and ſome ſigned by the mayor and others, who were proved to be capital burgesſes. A return, 16 Charles I. in theſe words: "Major per majorem partem capitalium & aliorum liberorum burgenſium burgi domini Regis de Lyme *Regis* prædicti ſecundum conſuetudinem burgi prædicti elegit Edm. Prideaux, &c." In 12 Cha. II. 31 Cha. II. 7 Will. III. and 8 Geo. I. by the "mayor and burgesſes." The returns from 1714 to 1774, are by "the mayor, capital burgesſes, and freemen, and under the common ſeal, with the ſignature of the mayor only; except that in 1727, ſigned by 46
persons,

persons, and that in 1768, signed by the mayor and 12 others.

Charles II. in the 36th year of his reign, granted a charter to the corporation, which partook of the prevailing principles of government of that time. It was annulled a little before the Revolution by the proclamation of James II. according to a power reserved in the charter for that purpose *. This charter contained the following clause relating to parliamentary elections, for the sake of which it was now produced for the sitting members †, viz. “ Et ulterius concessimus ac perpresentes pro nobis hæredibus & successoribus nostris concedimus majori & burgensibus burgi sive villæ prædictæ & successoribus suis

* See the note (G) after the Case of Saltash.

† The counsel for the sitting members offered this cancelled charter in evidence, as a proof of what was, at the time of granting it, the acknowledged usage of the borough in electing members. This was objected to on the other side: Because it was to be received either as a royal charter, or nothing: And as a charter it was annulled and cancelled, and had now no seal or other mark of authenticity: It was not what it purported to be, and therefore not to be received. For the sitting members, it was argued to be competent evidence to the purpose for which it was produced; i. e. of reputation and usage, because it appeared to be an antient paper of authority, found among the records of the corporation, and as such, entitled to respect in these questions. Hereupon the Committee came to a resolution to receive it in evidence.

quod

quod burgenſes eligendi & mittendi ad parliamentum noſtrum & hæredum vel ſucceſſorum, noſtrorum de cætero in poſterum electi erunt per majorem capitales burgenſes, & liberos homines burgi ſive villæ prædictæ vel majorem, partem eorundem *prout antebac in temporibus retroactis aſſuetum & conſuetum fuit*, infra burgum ſive villam prædictam."

The charter alſo preſcribes a new mode of electing and ſwearing in the mayor; and in that article does not refer to the antient uſage. In all the other charters, no mention is made of the election of members of parliament; and none of them give any directions about the electing or admitting freemen.

An entry dated the 29th of January 1593-4, 35 Eliz. "ad hanc diem extitit electio burgenſium parliamenti, & Robertus Haſſard electus eſt per majorem burgenſes & liberos homines. Et alter burgenſis, viz. Zacharias Bethel electus eſt per dominum Marchionem de Winton (B)."

An entry of the 7th of February, 1678-9, of an election of the members, by "the mayor and burgeſſes and freemen of the borough," to which is added, "beſides the capital burgeſſes, the freemen preſent were as follow:" After which are 33 names. Here the counſel for the petitioners obſerved, that they were all *inhabitants*; in which they were not contradicted.

An

An entry in the same terms as the last, of an election, the 30th of September, 1679.

An entry the 11th of January, 1688-9, in the following words: "Then chosen for members to meete and sitt at Westminster, the 22d inst. for this burrough, collonell John Pole, Esq. and Mr. John Burridge, Merchant, by the capital burgesſes, freemen and *freeholders*, and ſoe the returne was made accordinglie. by one Mr. Egerton a pretended Councillor."

The appearance of the writing of the latter sentence of this entry, occasioned observation upon its authenticity: The counsel for the petitioners alledging it to be in a different hand from the rest (which did not seem to be the opinion of the Committee) and an addition * made at a different time.

After reading the above entries, the counsel proceeded to others, tending to explain the terms used in those read by the petitioners, relative to the character of a *burgeſs* and a *freeman* of Lyme, viz. The following words written by way

* I had an opportunity of examining it minutely: It seemed to me plainly added after the entry was thought to have been finished by him that made it; as it came after a mark, which I observed to be the common period used by the writer of that book, for the conclusion of an entry. The hand writing of the whole had the appearance of uniformity.

of

of title, in the beginning of the book of freemen before mentioned, "The names of them that be made free, viz. Those that are no burgesſes, they to be called *freemen*; and thoſe that are burgesſes, they to be called *free-burgesſes*. All which do pay a fine and take their oaths."

"A Table *, conteyning as well the rates of the accuſtomed duties payable to the uſe and mayntenance of the town and cob † of Lyme Regis, as alſo certain other things concerning the fraunchiſes and liberties of the ſame towne. Written 8 July, 35 Eliz. 1583 ‡.

"By the charter of the burrough, the mayor and burgesſes ought to hold and enjoy, as well all things to them graunted therein by ſpecyall words, as all ſuch other cuſtoms, liberties and privileges, graunted and confirmed therein by general words, as they have uſed, and accuſtomed tyme of mind of man, whereof the freedom of the burrough is parcell.

"By ſpecyall words it is expreſſed in the charter, among other things concerning merchaun-

* The original having been lately loſt, it was read from a printed copy.

† The Pier which ſecures the harbour from the ſea.

‡ Two years before this, the queen had granted them a new and extenſive charter, by which the form of the corporation was in ſome reſpects altered, and its powers enlarged. This probably occaſioned the compoſing of the preſent table.

dize: 1. That no merchaunt, &c.—(then follow three particular provisions respecting trade.) After which it proceeds thus:

“ The customes and freedomes of the said burrough used tyme out of mind, and in generall words confirmed in charter by King Edw. I. and after by his succeffors, kings and quenes of this realme ever since, doe partly concerne.

“ Free burgesſes. All thoſe that had freehold within the borrough, and would be free of the freedome, were made free by a fine and by an oath, and then they were called free burgesſes.

“ Free men. *Item*, All others not having any freehold as aforeſaid, and would be free of the freedome, were made free by fine and oath as aforeſaid, and they were called freemen.

“ Free women. *Item*, The widowe of a free burgeſſ, or of a freeman, hath her freedome during her widowhood.”

After this follow ſeven other *Items* of different cuſtoms. Then a liſt of the cob duties paid time out of mind; referring to their being confirmed upon an inquiſition taken under an Exchequer commiſſion in 22 Eliz.

An

An entry in the old book of orders, in the page next to that read by the petitioners of the 30th of December 1609, (see p. 15) dated the 15th of February following, in these words :

“ Whereas on the 30th daye of Decr. laste, wee the mayor and his bretherne, with the better parte of the freemen and free-burgessees, which have their voyces in this election, did elect and make choyce of Mr. Geo. Jeffrey for burgesse of our parliament of our town of Lyme Regis : It is so that nowe again wee the mayor and company, with the free-burgessees doe stand to and acknowledge, that the said Mr. Geo. Jefferye shall stand and bee the sole and onelye man for burgesse of the parliament for our towne : Although there be order but for one to be elected (according to our first meaning). And for the better assurance and certentie hereof, we the mayor and bretherne do ratifye and confirme the same under our hands. Yeven the daye and yere first above written †.”

After

† The date of the entry of this election, does not agree with that of the issuing of the writ; which appears by the Commons, journal not to have been ordered by the House till 14th Feb. 1609-10. (1 Journ. 392,3.) The members for Lyme at this period were Sir George Sommers, (whose name is mentioned in the state of the evidence, in p. 38) at that

After which follow the names of those present.

The following entry dated the 30th of March 1614, was read, to explain, that of the 21st of March preceding, read by the petitioners. (See p. 16.)

“ Free burgesses which have their voices in the election of the burgesses for the parliament.” After which follow the names of twelve persons, all of whom were found to have been admitted freemen previous to that time.

time Governor of Virginia,—and Haffard. An attempt had been made to remove the latter for age and sickness, in 1605, (1 Journ. 256,7) but it failed. At the first meeting of the Commons in Feb. 1609-10, (no session having been held since July 1607,) they began to consider of filling up the vacancies that had happened in the mean while; and the Committee of privileges made a report on the subject: Among others, Haffard was then mentioned, as sixty-nine years of age, and bedrid; and Sir George Sommers, as incapable, by reason of his government. The House ordered a new writ in the room of the former, without debate; but the report respecting the latter, occasioned one, which ended in ordering a new writ for him likewise. Five days before, on the 9th of February, there is an entry in the Journal, of “ A petition from Lyme *Regis*, touching their burgesses, offered by Sir John *Jeffreyes*.” The object of it probably was, to have the vacancy declared. The member elected is described in the corporation book, as the son of Sir John *Jeffery*, Knt. who perhaps was the same person that presented the petition; very little attention being at this period paid to the manner of spelling names. The return itself is of George Jefferyes.

In

In the entry of the election of mayor in 1593, the persons present are arranged in three classes.

1. The capital burgesſes.
2. Liberi tenentes.
3. Liberi homines.

At the head of the *liberi tenentes* are two, Chriſt. Elſden and Richard Davidge, whoſe names are incloſed in a circumflex, with this note in the margin, "*liberi homines tantum.*" From hence it was inferred, that the word *freeholder* was often uſed to deſcribe free burgeſſes, in contra-diſtinction to mere *freemen*. There are twenty-one names in the claſs of freeholders, twelve of which were found among the admissions to the freedom, previous to that election *. Seven of the remaining nine were upon the reſiant roll of that time as free burgeſſes; but of theſe, five appear to have been admitted freemen after the date of this reſiant roll. The agent for the ſitting member, who had examined the books for this purpoſe, ſaid, he had found ten names of *freemen* upon the reſiant rolls which were among the admissions to the freedom *afterwards*. The name of Thomas Samford, mentioned in p. 15, as preſent at an election in 1609, not being then a freeman, was found in

* See in p. 16, the periods in which the books are miſſing.

a list of those present at an election of mayor in 1605; in which, after the names of those *de concilio*, or capital burgesſes, “Burgenſes et liberi homines inſimul”*, are claſſed together. From hence the counſel for the ſitting members would have inferred, that he was at that time a freeman. To obviate this, the counſel for the petitioners produced the following inſtances from the books of perſons appearing in thoſe mixed liſts at mayor’s elections, who are made freemen afterwards, viz. Robert Haſſard, voting in the election of mayor, the 23d of Auguſt 1581; his name firſt appears as a freeman in the freeman’s book in 1598, but it is among the free burgesſes in a reſiant roll of 1579. In the ſame mayor’s election J. Perrott votes; he too is among the free burgesſes in 1579; but the firſt of that name admitted a freeman, is in 1583. Nic. Dean, preſent in Auguſt 1581, is admitted a freeman in October following; his name is on the reſiant roll as a free burgeſs in 1579. R. Norris, preſent at the ſame election, is admitted a freeman in 1583. R. Davidge, preſent in Auguſt 1580, as a free burgeſs, is admitted a freeman in 1583.

Upon the point of reſidence, the following evidence was given.

* Other entries in the huſtings book of mayor’s elections, in the ſame form were produced.

An entry in a corporation book, dated the 29th of August 1580, in these words. "All the court, except Mr. William Elsdon, do agree, that the free burgesſes which appear, as well thoſe inhabitant as *not inhabitant*, ought to be ſworn to the election of the mayor: As alſo thoſe that hold any free burgages in the right of their wives (by Mr. Poole). Thereupon Robert Haſſard and Richard Davidge were ſworn."

An entry dated the 2d of November 1584. "This day at a court holden in the Moothall, it is agreed by the mayor and burgesſes of the town of Lyme Regis, that as well the burgesſes and freemen of the ſaid town, as well inhabitant as *not inhabitant*, and all other inhabitants, ſhall be contributory to the payment of taxes and impositions, to be levied towards the charges of the burgesſes for the parliament *."

Two perſons of the names of Roſe and Seward, had ſigned the return in 1627; and in order to ſhew the probability of their being at that time non-reſident, an entry in 1631 was read from the books, ſtating, "foraſmuch as they being capital burgesſes, are gone to live out of the town, and have not of long time been here aſſiſt-ant to Mr. Mayor, &c." they are therefore hereby

* One of the Committee deſired to ſee the return next following the date of theſe two entries. It was that before ſtated, in p. 8, in 26 Eliz. by burgesſes and *inhabitants*.

ordered to return by a given day, or that they will be disfranchised.

Nicholas Hunt appears to have voted for mayor in 1601; within three months after, on the 23d of November in the same year, he is mentioned as living at *Culliford*, several miles distant.

Philometh Dummett, who resided out of the town, attended at the leets in 1666.

The following are instances of gentlemen, whose descriptions were said to shew, that they lived at places in the country, some miles distant from Lyme.

In 1598, August the 28th, Mr. Somers, of *Bourn*, is admitted a freeman, and on the same day votes for mayor; on the 6th of September, he is sworn of the town council; in 1601, and 1604, he acts as capital burghess. In 1605, (being then Sir George Somers, Knt.) he is chosen mayor. But in the entries subsequent to that of his admission, he is not described of *Bourn* or any other place.

In 1606, Sir John Jeffery, of *Catherston*, is admitted to the freedom; at the same time Sir Robert Strode of *Parnham*.

In 1607, these three vote at the election of mayor.

In 1613, John Drake, of *Albe*, votes for mayor.

In

In 1611, George Brown, of *Wimburn*, is admitted a freeman and recorder; and in 1616, votes for mayor.

In 1608, Sir John Strangeways, of *Abbotsbury*, is admitted; and in 1619 votes for mayor.

In 1611, Arthur Gregory, *chief searcher of the port of Poole*, is admitted; and in 1620, he acts as a capital burghes in the election of mayor; his name likewise appears in the return to parliament of 1625.

In 1660, John Strode *, of *Parnham*, is admitted; and in 1665, acts as a capital burghes in the election of mayor.

The entries in the Journals of the 6th of January 1701-2, (13 Journ. 654.) and of the 26th of November 1708, (16 Journ. 18) were read. The former contains the petition of a Mr. Hallett, against the election of one of the fitting members (Mr. Paice,) expressly alledging the right of voting for this borough, to be "in the mayor, capital burghesses, freemen and freeholders inhabiting within the borough," and complaining of the mayor for refusing such votes. This petition was afterwards dropped, for nothing further appears of the petitioner in the Journal. The other entry contains a petition

* The witness Alford, mentioned in p. 19, speaks of Strode's voting.

of Mr. Henley, against the election of Freke and Burrige in general terms; and also a petition on the same side from the "capital burgeses, freemen and freeholders, inhabitants within the borough," stating their right to elect, and the mayor's refusing to receive their votes for Henley. These petitions were likewise dropped.

The counsel for the sitting members also produced the minutes of the resolution of the select Committee in 1781, declaring their judgment of the right of election as before stated in p. 4.

The following entry from the Journals of the election in 1727, was not, in point of form, read to the Committee; but it was referred to in the arguments of both sides and by the Committee, as if it had been.

21 Journal 68; "Mr. Earle, according to order, reported, &c. and the report and the resolution of the Committee are as follows, viz. Upon the petition of Henry Holt Henley, Esq; complaining of an undue election and return of John Burrige, junior, Esq; to serve for the borough of Lyme Regis in the county of Dorset; and also the petition of divers inhabitants of the borough, whose names are thereunto subscribed in behalf of themselves and many others, who have a right to vote at the election of burgeses,

ges, to represent the borough in parliament, praying relief against the pretensions of Mr. Henley, to be one of the representatives of this borough.

" That the Committee proceeded to examine the merits of this election, so far * as the same were referred to them.

" The House having adjudged, that Mr. Burridge, being mayor of this borough at the time of the election, and the proper officer to whom the precept was directed, was not capable of

* Henley's petition (21 Journ. 33.) does not alledge any particular right of election, but objects principally to Burridge's return of himself as *mayor*. It also charges him with obtaining a majority by illegal practices, and with not having a qualification by estate. On the next day after this petition was presented, (p. 35.) the House entered upon a consideration of the return; and it appearing that the mayor had returned himself, they referred to the Thetford case in 1685, (9 Journ. 725,) in which it had been resolved, that no returning officer of a borough could be elected or returned for that borough. Hereupon it was resolved, that Burridge was not capable of being elected or returned: And the Committee of elections (to whom the *whole* of Henley's petition had been before referred) was ordered " to examine the matter of that part thereof which relates to the petitioner's complaint, *That he, although duly elected, was not returned.*" Upon which the above report was made to the House. The petition there referred to does not state any right of election, but is expressed in general terms. It is called in the Journal (p. 58,) as in the above report, " A Petition of divers inhabitants, &c."

being

being elected, and returned for the same borough.

“ The counsel for Mr. Henley proceeded to make good the allegation in his petition, that he was duly elected. And they alledged, that the right of elections is in the mayor, capital burgesſes, and freemen of the borough.

“ That the poll as between Mr. Henley and Mr. Burr ridge was,

“ For Mr. Henley, 41

“ For Mr. Burr ridge, 52

“ Mr. Henley’s counsel called

“ Mr. Thomas Cowper and John Bowdidge ; who, being examined, gave evidence, that at the time of the election, upon Mr. Burr ridge’s declaring himself a candidate, Mr. Henley made a public declaration to the voters, that Mr. Burr ridge being then mayor, was incapable of being elected for this borough.

“ George Buck, being examined, ſaid, that about two or three days before the writs for calling this parliament, came out, ſixteen voters (who he named) were admitted freemen by Mr. Burr ridge as mayor, upon condition, that they voted for him in the election ; which they promiſed and gave notes to perform ; and that they all voted for him accordingly, and not one for Mr. Henley.

“ That nobody appeared before the Committee to make good the allegations in the said other petition of the inhabitants above-mentioned against Mr. Henley.

“ That the Committee came to the following resolution :

“ Resolved, That it is the opinion of this Committee, that Henry Holt Henley, Esq; is duly elected a burghess to serve in the present parliament for the borough of Lyme Regis, in the county of Dorset.

“ The said resolution, being read a second time, was, upon the question being put thereupon, agreed unto by the House.”

The counsel for the sitting members also examined Mr. Follett, the town clerk of Lyme. He said, he had held that office fifty years. In all his time there had been but one form of oath administered to freemen of all descriptions upon their admission, which was that before-mentioned, as the freeman's oath in p. 11 ; he had always considered it as the proper one, nor had he ever known any objection to the administering it in that form: That the proclamations stated in p. 11 have never been used in his time ; the form now used in elections has only general words, calling upon “ all who have a right to come and vote.”

It

It is his duty to make out the lists of juries for the court-leet; and in performing it he has never made out summonses for persons non-resident; but he has occasionally entered the names of by-standers in the court who are not freemen, when jurymen have been wanting to complete the number. In all the elections in his time, he never knew the vote of a non-resident refused, nor a freeholder as such received.

His first acquaintance with the borough began after Mr. Scroope's coming there; from which time the borough had been under Mr. Scroope's management, and that of his successors, the Fane family. The number of freemen was then about one hundred. Many of the returns in this period have been signed generally by the mayor, under the privy seal. One he remembered under the common seal, and signed by the freemen. The only contested elections in his time were those of 1747, 1780, and the present.

He mentioned the following particulars of that in 1747. He was then in the interest of Mr. Scroope and Mr. Henley, and attended the hustings in the execution of his office of town clerk. Henley and Scroope were joint candidates. The former had known the borough from his infancy. He canvassed the freeholders, and before the election wrote a letter to him, (the witness) desiring him to tell a Mr. Davis to be

active in canvassing them. (This letter he now produced.) Henley himself possessed several borough freeholds*; more than any other person. Although Drax had left the town in the morning of the election day, yet Burrige and Freke, who supported him, insisted upon having a poll taken. There were about 60 or more freeholders in the hall; but the mayor would not receive their votes in that right. About 30 or 40 freemen voted, and some few for Drax. He himself voted as a freeman for Henley and Scroope. Mr. T. Fane, after the mayor left the hall, took a list of the freeholders that would have voted for Drax, for future use, in case of a petition to the House from that party, and in order to know their numbers. While this was doing, Henley and Scroope were on the hustings. Mr. Follett said, his own opinion at that time was, that the freeholders had the right; he believed he was not asked his opinion upon the subject, and that he did not mention it. Almost all the freemen living in the town, and within a short distance from it, were in Henley's interest; and if the mayor had received the votes of freeholders, Drax would, notwithstanding, have failed.

* Brayholt, the witness, upon the trial in 1689, (see before p. 22.) mentions '*Squire Henley's* making several freeholds for election purposes.

Upon

Argument for
the Petitioners.

Upon this case the counsel for
the petitioners argued in the fol-
lowing manner :

Upon the first point, the qualification of residence, the claims of both parties are founded on a corporate right; and the method of establishing both, is either by express grant of the crown, or by prescription. There is no charter from whence the right is said to be derived to either party; therefore both must support their claims by prescription, which is to be traced through evidence of the usage and reputation. The petitioners shew both these to be in their favour from the records of the corporation, the returns to parliament, and the testimony of living witnesses.

With respect to the long period of late years, during which the usage has been in favour of the sitting members, as perhaps great stress will be laid upon it on their part, it is necessary to explain its real effect and principle. The effect which the law gives to length of possession, ought not to be attributed to this period, according to the number of years it consists of, but according to that of the times of *exercising the right* in it. Of this there have been only three instances within the last 70 years, of which they can make any use, viz. in 1727, 1747, 1780; for in them only have elections been contested. Where
elections

elections are not contested, as all parties are then agreed as to the end, they are not very attentive to the means of obtaining it. In such cases, though the mode of electing were not agreeable to one set of men, they would not be ready to insist upon another, when their choice would fix upon the same persons: The dispute would have no object, and could not be decided. There are, besides, other causes that may have operated: Particular persons or families may have been generally liked in the borough, and then there could be no room for discontent. Such instances, therefore, of exerting a right, ought to be laid out of this question, and considered as a blank in the inquiry. They add no strength to the other side in this dispute, because they were not *adverse* to the claim of the petitioners. When A and B are contending, A's possession will not avail him, unless it has been held in opposition to B's.

It is a clear and true proposition, that if the petitioner's right of election was ever, at any time, clearly ascertained, it must exist through all time; no agreement of parties, nor any authority, but that of the legislature, can take it away: It still exists, and the Committee must now establish it.

The circumstances of the elections in 1727 and 1747 are such, that the right of non-residents derives

derives no support from them. In the former only *one* voter of 46, who signed the return, is proved to have lived out of the town, and he was an *honorary* freeman*. Now, certainly, honorary freemen are not bound to reside; but, without doubt, they have no right to vote: Because, being admitted to the freedom without taking the established freeman's oath, their admission is bad, and they are not legal freemen; *Oke*, therefore, was clearly a bad vote. The event of the petition to the House, in Henley's favour, rendered it unnecessary to inquire into the merits of particular votes; therefore it cannot be argued, that this vote would not have been disputed, if the numbers on the poll had made it material. There were 41 votes for Henley, and 52 for Burridge; of which latter number 16 appear to have been struck off as occasional; which gave the petitioner a great majority, and concluded the cause†.

In the election in 1747, all the freemen were united against the freeholders, and the question of *non-residence* was not stirred.

Thus stands the whole evidence of this modern length of possession for 54 years; in which only *one* person residing out of Lyme is *proved* to have voted for a member of parliament in a

* See p. 26.

† See p. 42.

disputed

disputed election; and other circumstances made it not necessary to object to him; for which reason only he passed without notice. This, surely, is insufficient evidence of a prescriptive right. In such cases not only facts, but the common reputation should be proved. In this view how does the case stand? It must be supposed, that if any inhabitant of Lyme could contradict the evidence before the Committee, he would have been brought forward now. As it stands, the current reputation is all on one side. Mr. Scroope's conduct, in 1734, is a strong confirmation of it: This circumstance shews, decidedly, the prevailing opinion of that time of the established right of election; and proves that if, in any instances, non-residents have voted, their acts have been a usurpation.

Tracing backward from this period, the evidence tends strongly to support the claim. The forms and expressions of the several returns, are, it must be admitted, different; but not inconsistent, unless they are taken to support the non-residents. Take the whole evidence together, and that method of judging which tends to reconcile the whole, should be the rule by which the Committee ought to form their decision; not that which tends to distract it.

Now all the returns till the reign of Geo. I. are consistent, and in favour of residence. *Inha-*

bitants are mentioned in the earliest return; it was therefore a qualification then. It never was contended that *all* the inhabitants might vote; and neither party contends for it now; therefore the expression of this return, "*with the inhabitants*," cannot be said to have described a distinct set of voters, but, in an awkward manner, means some quality applicable to the other class. If inhabitants as such had voted, no other class would have been described, as it would have included the rest. This construction is confirmed by the next return, which is by *burgesses, inhabitants*. The different form of expression in the next following return is open to the same explanation, and so is that of 30th Eliz: The words "*on behalf of the inhabitants and commonalty*" can mean, of those only who had the right of voting. It is a tautology in expression, and may be construed to be a return by the persons making it, *on behalf of themselves*; but the substance is right enough. The intervening returns till 1689, compared with the other collateral evidence, appear to have been made in the same manner, by *inhabitants*. For a period of 26 years before 1721*, the returns are all made expressly by *inhabitants*. If this evidence does not convince the Committee, that during this time residents

* There was no election between 1714 and 1721.

alone held the right of voting, they must either say, that the returns are false, or that these freemen usurped the privilege. As to the first, there is no suspicion of it hinted; and as to usurpation, it cannot be believed, if the evidence of traditional reputation in the borough is not rejected. Thus, from the earliest times to the year 1721, the evidence is uniform in favour of the inhabitants. This shews how little effect is to be given to the modern usage, which, even during its exercise, was always contrary to the general opinion of the right. This opinion was not carried into practice, because no proper opportunity occurred in the whole time for enforcing it, and for trying the question.

The returns in which the word *freemen* occurs, do not prove that non-residents took part in them. Though that word, used indifferently, may mean the whole body corporate, yet, upon this occasion, the usage shews it to have been limited to inhabitants.

The return to the convention parliament does not expressly contain the term *inhabitants*; but there was, on that occasion, a particular request in the summons to conform to established customs, with which it is to be presumed they complied. But this does not rest on presumption; for the proceedings upon the trial of that election in the journals, shew that the House

then thought this qualification necessary. It was said upon the trial of the former petition, that this determination of the House is to be imputed to party motives, and that the question of Whig or Tory was that which guided it. There was no authority for this but assertion; unless every determination of the House is to lie under the same imputation. Without entering further into this indiscriminate censure, it will be more to the purpose to examine the evidence itself from whence the opinion of the House was formed, and to try if it be possible now to think differently. The report in the Journals gives the present Committee the same means of information as the House at that time had; and it may be observed, that the Committee of that day were not likely to have omitted, in their report to the House, any circumstances tending to support their own opinion. It appears, that of Drake's 29 votes, five were non-residents; of Burridge's 30, four were not freemen. *One* witness only is called in support of the foreigners; and he †, in the execution of the corporation act in 1663, *called in to his assistance* some gentlemen of the neighbourhood for that particular service of government *in the corporation*. After which

† See p. 19. Gregory Alford is the name of the person afterwards named Mayor in the garbling charter in 1684.

time they used to attend in *corporation* business; and *once* only (for he can *ascertain* no more, though he believes it was oftener) two of them voted for a member of parliament; though it does not appear whether that election was contested or not. This is the whole substance of the evidence upon this point, on Drake's part. It is such as no judge in a civil suit would even have left to a jury, as evidence of a prescriptive right. *One* only witness, without pretending to speak of the reputation, naming one single instance, and that not clearly explained. This evidence, weak as it is, is still more weakened by the circumstance of *Drake's* objecting to two votes for Burrige as foreigners. Now if he had relied upon the right of non-residents, is it possible that he would have made this objection? It is plain he knew his own five could not be maintained, and therefore wished to make Burrige's fall with them. On the other side, two witnesses declare positively, that they never knew a non-resident admitted to vote. The evidence upon the two objected to by Drake, is stronger for their residence. Upon this case the House could not, in justice, do otherwise than seat Burrige. But if they had thought non-residents good votes, Drake must have been successful. By their determination they must have adjudged, either that freeholders had the right, or that

non-residents had not. This adjudication will admit of no other construction.

Not only the express words of the returns are in favour of the petitioners, but those whose form is indifferent to this question, are proved to have been made by *inhabitants*. It is wonderful, considering the difficulty of proof, from the great distance of time, the mutilated state of the books, and the intricacy of the subject, that the petitioners have been able to trace the history of so many obscure persons who signed those returns. Upwards of 140 names, signed at different times, have been found to correspond with the probable proof of their living in the town. In a few instances the attempt has failed of being *quite* satisfactory; but even where the space of time has been greatest between the several entries of the corresponding names, even in the instance of 57 years, it is more reasonable to presume in favour of the identity than against it, because that is warranted by the general usage and reputation. It has been proved, on the part of the sitting members, that persons not living in the borough have been freemen, and have voted in elections of mayors and other internal business of the corporation; but one instance only is given of such persons voting for a member of parliament in all this time, and that rests upon a loose presumption: Because Gregory

gory is described as chief searcher of the *port of Poole* *, it is inferred that he lived there: On the other hand, in the entry of his admission to the freedom, he is described of *Lyme*, is on the defiant roll in 1611, about that time was mayor, and necessarily resident at least for a year; and in 1625 he signs a return to parliament as a capital burghers †.

If those country gentlemen, whom they proved to have been freemen, had voted at parliament elections, is it not probable that their appearance would have been recorded? The town would have been proud of shewing their names in their books and returns; they would have stood foremost of the list.

The disuse of the old election proclamations is a part of that system which has prevailed for the last 50 years, while the opposite party has had the management of the borough; but their authenticity is not thereby diminished. It must be presumed, that at the time of their date, (which must have been prior to 1698) the corporation knew the right of election better than they do now; these are public acts by their authority, and are founded upon the received

* The Committee were informed, that this office was now always joined with the same office in the Port of Lyme.

† These circumstances were proved from the books.

and settled notion of the necessity of evidence. In the investigation of antient rights, there cannot be better guides than the forms of public instruments, because they are framed according to acknowledged reputation, and known to every body.

If after weighing this evidence, the Committee should decide in favour of the non-residents, they must adjudge the *antient* usage (for such it is proved) to have been illegal. But a contrary decision would be consistent with that usage, and with the evidence of the corporation books, and would contradict no indenture of return.

Upon the second point,—the evidence of the freeholder's right does not rest alone upon the terms used in the books, but also upon frequent exercise and acknowledged reputation. In what manner it was exerted before the reign of Mary is unknown; but the first charter of the borough plainly laid the foundation of it. The *men* of Lyme there incorporated, must have been the homagers of the king's demesne, who did service at his court for their lands. Members for boroughs first came to parliament in the reign of the same prince who granted this charter; and it cannot be doubted, that those to whom the charter was granted, returned the members. The terms used in the books, at the time in which this

I inquiry

inquiry begins, retain the appearances of this institution.

The word *burgensis* has many different meanings according to the subject matter; it may mean, the inhabitant of a borough, a burgage tenant*; a borough freeholder, a corporator, or a member of parliament. Its particular application is to be discovered by the constitution of the place. In the books of this corporation it means *a freeholder of the borough*. The roll of 1577 explains it pointedly: Here, among *burgenses* SIVE *liberi tenentes*, are three women; therefore these *burgenses* are not members of the corporation. They are also contradistinguished from *liberi homines*. If the former described *freemen*, their names would not be repeated among the freemen; but there are seven names so repeated. The elections made by *burgenses* & *liberi homines* INSIMUL, keep up the same distinction. The two characters, therefore, cannot be the same; which is still further confirmed by the subsequent admission of several of these *burgenses* to be freemen; therefore *burgensis* and *liber tenens*, must have been used to describe the same person.

The word *burgensis* having thus been shewn in several entries to describe a *freeholder*, must therefore in the returns of the same time, be in-

* In this sense it is used at Pontefract. See Vol. I. p. 8.

tended of the same person. It is not contended by this argument, that it excludes freemen but that in returns, the general term is applicable to both; and in this sense the returns by *mayor and burgeses* are to be understood. But when contradistinguished from *liber homo*, *burgensis* has no corporate signification. Even the corporators themselves, when most anxious to exclude the freeholders, in those returns in which they call themselves "*burgesses all freemen*," seem to admit this construction of the term; for if *burgesses* meant *freemen* only, they would not have added to it an expression of the same meaning. Freeholders here have no right to be admitted freemen of this borough. This has been finally determined in the court of King's Bench, after some attempts very strenuously made on their part to gain that point*.

In

* The following general account of the transactions here referred to, may be useful to some readers. Previous to the election contest, in the year 1780, the party of the petitioners claimed to be admitted into the corporation upon two grounds of inchoate right; one as being freeholders, the other as eldest sons of freemen. In this right the mayor, in 1779, admitted about 40 or 50 persons to be freemen. The opposite party immediately obtained *quo warranto* informations against the persons so admitted, which came to be tried at the Dorchester assizes in 1780. At this trial the freemen failed in establishing the custom they relied upon, and verdicts passed against them, upon which judgments of ouster were signed.

In this sense all the returns are consistent with the freehold right till 1678, when an attempt was made to destroy it. It seems to have been vigorously pursued, and several entries appear in the books in the prosecution of this plan. The entry of the election in February 1680-1, could have no other object. The excessive caution used to express, that freemen *alone* made that election, argues a consciousness of a right claimed by others of whom they were afraid. The charter of Charles II. seems to have been granted principally with this view.

By the entry of the 21st of March, 1613-14, the *corporation* books themselves shew an election to have been made by freemen *and freeholders*. One of the members then chosen is the recorder. Now it can hardly be thought that a recorder, who is naturally of the corporation party, would have allowed a right contrary to theirs to be in-

signed. Having been defeated in this scheme, the same party afterwards endeavoured to disfranchise a number of their opponents in the common council of the borough, upon the ground of their non-residence. The merits of this cause of disfranchisement never were brought to trial, being stopped in their progress through the court of King's Bench, by some technical objections to the pleadings in the returns to the writs of mandamus. These cases are reported Doug. Rep. 79, 130, 144, 168; after which this question was not renewed.

forced,

forced, and be preserved by their own records, unless it had been thoroughly established.

As to the evidence of reputation, that also is strongly with the petitioners on this point, as well as on the other. Though the corporation has by strong hand excluded the votes of freeholders, they have not been able to stifle the reputation of their right, nor the belief of the borough in their favour; in which belief even some principal members of the corporation have concurred. In the contested election in 1689, evidence was given to the House to the same effect; and though the witness *Alford* there says, they never were admitted, and had never returned; as having been mayor of the town, he must have known the contrary, and that they had signed returns. There are two circumstances proved on the present occasion which strongly corroborate this reputation: One is, the canvassing of the freeholders in the elections of 1727 and 1747; the other, Henley's particular application to that interest. Every candidate makes it his first and principal business to know the right of election as generally understood, and never fails to follow the most received notions of it. Henley's particular situation as recorder, his family connection, and personal acquaintance with the place from his earliest days, enable us to draw from his conduct a convincing proof of
the

the reputation then established: And he took great pains to gain the freeholders.

Thus every circumstance tending to establish a prescriptive right, has been proved by the petitioners. Supported in this manner they have not been afraid to encounter a declared judgment of the former Committee against their claim. It is no disrespect to the authority of such a tribunal, to suppose it capable of error, or to obtain a revival of its sentences. This is conformable to the practice in the other courts of justice, whose authority is the most revered. In them, parties may, without offence, obtain a second or a third trial of the same question, if dissatisfied with the first. But it is particularly proper to allow of such proceedings in a court from whose judgments no appeal can be brought; which may be passed by a small majority of the judges, and with many dissentients; and where the causes are often of the greatest public importance.

The counsel for the sitting members argued in the following manner:

Argument for
the sitting
members.

The petitioners are sensible, that they labour under considerable difficulties in advancing a claim against the continued usage of seventy years, and the solemn judgment of a court of justice. Their means of supporting it consist

of

of the loose evidence of antiquated papers and records, and a vague obscure tradition of reputation, to which theoretical arguments of antient institution, and much uncertain presumption are added, to give a colour to the whole. In this manner they endeavour to overturn a long established right and well founded decision.

It might have been expected, that they would not have ventured to question the sentence of the former committee, without some addition of strength to their case, or some new discoveries of evidence; but on the contrary, the evidence in the present case consists of the same particulars as before, except that it is now much abridged, and the method of conducting it reversed. The claim too is materially changed. Formerly the point of residence was of secondary and small concern: The freeholders' right was the great question. But now that is placed behind the other, and gives way to the point of residence to which the petitioners direct their strength. This shews, that they have been sensible of confusion in their opinions, and deficiency in their proofs.

Their theory sets out with supposing, that the charter of Edw. I. first made a corporation at Lyme, and that this corporation was composed of burgage holders. But the charter itself is not inconsistent with the notion of a pre-existing corporation:

poration: And their theory is contrary to a late verdict and judgment in the court of King's Bench, determining the corporation to have been prescriptive *. But supposing the persons described as the *men of Lyme* to have been freeholders, and incorporated as such, it does not follow that the freeholders of this day have any right of admission into such corporation. The only mode of becoming a member of a corporation, is according to the rules and orders of the body corporate. In this borough the common council have the right and power of admitting only such as they please to be members.

With respect to the claim of the freeholders, the principal arguments for it are derived from a connection between the entries of the corporation books, the resiant rolls, and the returns. If the inference from the several terms used in

* The case here alluded to, was tried before Mr. Baron Eyre, by a special jury at Dorchester, in the summer assizes of 1784. It was a *quo warranto* information, prosecuted by the party of the petitioners, against one of the capital burgesses, founded in the supposed illegality of his election, according to the terms of Queen Elizabeth's charter. The defendant could not prove his election to have been made, as the charter required; but endeavoured to support the legality of it by evidence of a prescriptive institution in the borough, with which it accorded in some measure: And the judge and the jury being of this opinion, a verdict was found for the defendant.

them

them is fallacious, their case wants its principal support. The manner of making this deduction is very different from that by which the sitting members maintain the positions of their case: *They* explain the records by a definition which the same records authorize, and not by *speculation* or hypothesis.

The title of the freemen's book is a very important piece of evidence, because it seems to be placed as a public and formal rule or definition, to regulate the terms used in the books, and to prevent mistakes. The expressions are precise and clear; but the manner in which the counsel on the other side explain *their* meaning of the same terms, is by connecting a number of circumstances, which seem to lead to it only because they beg the question which is to be determined. *If* freeholders used to vote in that right, then their construction may be just. But the sitting members contend, that none but *members of the corporation*, in antient as well as modern times, have elected the members of parliament, and that no freeholder ever voted as such till the time of the revolution; the circumstances of which case are to be explained.

Too much authority has been allowed to the resiant rolls; for they are not acts of the corporation, but of the officers of the court-leet; but, (without insisting upon this objection,) they do
not

not warrant the conclusion drawn from them. It is inferred, that the class of *burgenfes sive liberi tenentes* could not belong to the corporation, because women are enumerated there, and because persons of the same name appear to become freemen afterwards.

First, this title is in the disjunctive; and imports either that they were freeholders admitted freemen, *or* mere freeholders. In this sense there is no impropriety in classing women in the list; besides, according to the custom, the widow of a burgess has her freedom. The title of the freemen's book defines the word with accuracy; and that gives the construction which the sitting members contend for: This is likewise confirmed by the Table of customs. By these authorities it is shewn, that the word *burgensis*, in the old records, according to its proper construction, signifies *a freeholder admitted to the freedom*. Secondly, the inference drawn merely from a resemblance of names, in so few instances out of so many, is improbable and unjust. Because, at the distance of 200 years, it cannot be shewn that certain persons were, on certain days, admitted free, though the books of admissions of half the time are lost, and those which exist are allowed to be defective, therefore it is concluded that they were never admitted. This general conclusion, unfair as it is, is connected with,

and depends upon, that drawn from the particular instances: What these are will be best seen by examining them. They select four names out of six times that number, in an entry of an election* in 1609, of persons who, they say, could not have been freemen; because George Pley (one of them) was a freeholder in 1598, and because George *Plea, junior*, first became free in 1612. But it is not probable, that a man described generally in 1598, would be called *junior* 14 years after: But the hustings book contains the name of George *Pley* a freeman in 1576. The next instance requires, that we should believe that there could be no other Anthony Elfden but the heir of one William Elfden, and that he must be the same person who is admitted a freeman by that name. The other two instances rest upon the same sort of doubtful conjecture. Thomas Samford, who is one of them, appears to have voted at an election of mayor before this year, and therefore must have belonged to the corporation. Further, it is at this very period that the chasm in the books is the greatest. But this is not all; for the entry following, upon the same leaf, of this election, shews expressly, that the persons present were freemen and free burgeses. What a free bur-

* See p. 15.

gers is, is explained by the title of the freemen's book.

In this manner are made out those examples of connection that are to serve as guides through this inquiry, and from which a general rule of evidence is to be formed. Even if the books were not known to be defective, or if no chasm appeared in them, it would be a bold attempt, at this day, to disturb a long and quiet possession upon no better foundation than such presumption.

The entry of the election in 1614, by the *freemen and freeholders*, when explained by that following, shews that they were all free burgesses; and that the term *freeholder*, used upon that occasion, and on many others of the same sort, is inaccurate, and means a freeman who has the freehold quality besides. None but members of the corporation could partake in these acts; and if they consisted of two orders of persons, it was natural to distinguish them by different names. In this case the only name of distinction for one class was that of freeholders, because in that character alone were they distinguished from the other freemen.

The argument before mentioned affords a sufficient answer to all those conclusions, whether drawn from entries or returns, by which the petitioners prove persons not to have been freemen,

whose names cannot be found in the admissions. It is now become impossible to prove the *times* of their admissions; but the other transactions of the borough, and the situation of those persons, lead to a fair presumption that they were freemen, and that if the books had been complete, their particular admissions might now be found.

In 35 Eliz. the entry of the election is by the "mayor, burgesſes, and freemen." If by *burgess*s was meant a mere freeholder not of the corporation, it is not probable, that in the acts of the *corporation*, such persons would be ranked before their own members.

There are three entries of elections by the "mayor, burgesſes, and freemen," in 1678, 1679, and 1680. The latter is said to be made *without the contradiction of any others*. What benefit the petitioners can derive from this, it is difficult to discover. They cannot argue that the words were false, and that the freemen's right was contradicted. It must be believed, that no freeholder at that time claimed. The caution of the freemen ought not to be imputed to them as a weakness: It was a proper security against the innovation which they might then see forming. So the returns in the latter part of the reign of Charles II. by *all freemen*, contained

tained a positive denial of the alledged exercise of the right by freeholders.

The true origin of the freehold claim appears by the returns. It began at a time when the whole nation was in a political ferment, and when the change of government and laws had opened the way for innovation in every department. The temper of the times afforded opportunities for advancing new pretensions with success; and many who favoured the new government made use of them. The election to the convention parliament is the first in which *freeholders* appear; but even that election seems to have been brought about by artifice. Egerton perhaps undertook to carry them through, and bullied the corporation to submit to it; but the entry shews, that they resented it. The little that appears in the journals of the evidence, upon the petition against this election, is unfavourable to the freeholders. The witnesses do not prove the exercise of the right with any certainty, nor the reputation; one *thinks* they voted at an election, which does not appear to have been disputed; but another on the same side says, they had been hooted upon coming to the hustings to vote. But it can hardly be believed that the journals state all the case. The decision of the House is a remarkable instance of the unjust manner of determining elections for-

merly. It is natural that the petitioners should wish to pass over this subject; but the Committee know too well how little respect is due to a decision by such a tribunal so formed. The Committee of privileges *heard* the evidence and made their report. The House, who *did not* hear the evidence, chose to think differently, and decided against it. But it is giving too much credit to the freeholders, to suppose that their claim was the foundation of this petition. It plainly had another object.

Before this period, if freeholders had ever claimed, the corporation resisted them, and with success. But now they contrived to get a temporary credit; and their names appear in some of the returns in the course of the 26 years following the revolution. After which they return to their former state.

There are 12 returns from 1689 to 1714; but even these are not uniform; six of them contain the name of freeholders, and six are by freemen only. So that as far as the 12 returns go, the ballance is even. Before this time, all of them are adverse to the petitioners. But in this short period, a continual contest was kept up, in which the freemen were always successful, and at length forced the freeholders to give up. In 1701, there was a petition to the House, by the freeholders, who could not prevail on

the mayor to receive their votes, which petition they afterwards abandoned. So sensible were they of the weakness of their claim, that within 12 years after its first success, they were obliged to renounce it. Again, in 1708, the returning officer rejected them, and they again made a shew of petitioning the house, but from this attempt likewise they receded.

In this favourite period of the freehold right, the returns are as much against it as for it; though encouraged by success in their first pretensions, they cannot keep the station they have gained; are afraid to bring their claim to a fair decision, and are twice obliged to relinquish, after two direct attempts to secure it.

So conscious were the party with whom the modern attempts originate, of their little chance of success, that they did not venture upon them till urged by despair. After having in vain attempted to gain the privilege of the corporation, all their law exertions were at first directed to the claim of freeholders to be made freemen; and by the artifice of a mayor in their interest, a great number of them were admitted on this footing. But upon a full inquiry into their pretensions in the court of King's Bench, they were adjudged illegal, and the persons so admitted were all turned out *. The counsel for the pe-

* See the note in page 58.

tioners, when they mention this circumstance, are not aware how strongly it turns against them. They seem to consider it as an axiom, that freeholders must have *some* right in the borough; and not having the lesser right of being freemen, *ergo* they must have the greater of choosing members. From the same premises it might be concluded as justly, that they have none at all.

It is remarkable, that all the returns produced, are either under the common seal of the corporation, or the mayor's official seal; both which imply a corporate act *. The recital in the charter of Charles the Second, likewise adds great weight to the same side, for it refers to the antient and sole right in the freemen, as a matter known to every body. The canvassing of the freeholders formerly, is not proved with any precision; and if it were, it ought to have but little weight under such circumstances; for in contested elections, candidates employ every method of securing votes. It has been said, that Burrige canvassed the freeholders in 1727; but it is certain, that as mayor, he refused their votes and accepted none but those of freemen: From hence it may be judged, what the canvassing was, which it is said, took place then, and also in 1747. Henley's conduct in this year

* See note (D) on the case of Saltash.

only shews, that at the time of his letter, he wished to keep things quiet, and to prevent trouble or expence. He could not have any serious thoughts of supporting the freeholders, because at the election he joined with Scroope in opposing them *.

As to the point of residence, the evidence to support it consists of similar materials, from which similar deductions are made as in the other case. Upon both, it may be observed, that the primary proposition upon which the arguments are founded, is not proved. From a few facts
not

* There seems to have been much inconsistency in the conduct of the candidates at different times, concerning their interests in this borough. At the time of the trial of the petition in 1689, it was said by one of the witnesses, that Henley had made freeholders for an election; and in 1708, we find the same person, or one of his family, standing upon that interest. Yet, in 1727, Mr. Henley's counsel assert the right of voting to belong to the corporators only; and again, in 1747, Mr. Henley opposed the freeholders, in conjunction with Scroope. In that year, the freeholders were supported by Freke and Burrige, (see Follett's evidence) whose names are those of the members returned in 1708, upon the corporation interest; against whom Henley then petitioned in behalf of the freeholders. *Burrige* is the name of a mayor, who in two different periods, was complained of, for having refused the freeholders' votes. If these facts were not well ascertained, it might be inferred from the repetition of the same names in the following list,
that

not well explained, they say, the antient usage is proved to have been conformable to their claims; and then, supposing such to have been

that there had been but little dispute about elections in this town for more than a century past. It contains the

Names of the members for Lyme, chosen at the several general elections, from the year 1660, to the year 1761.

1660 Walter Young,	Thomas Moore.
—61 Sir John Shaw,	Henry Henley.
—78 Sir George Strode,	Henry Henley.
—79 Thomas Moore,	Henry Henley.
—81 Thomas Moore,	Henry Henley.
—85 Sir Winston Churchill,	John Pole.
—88 John Burridge,	John Pole.
—90 John Burridge,	Henry Henley.
—95 Robert Henley,	Henry Henley.
—98 Robert Henley,	Henry Henley.
1700 Robert Henley,	Joseph Paice.
—1 John Burridge,	Joseph Paice.
—2 Henry Henley,	John Burridge.
—5 Thomas Freake,	John Burridge.
—8 Thomas Freake,	John Burridge.
—10 Henry Henley,	John Burridge, jun.
—13 Henry Henley,	John Burridge.
—14 Henry Holt Henley,	John Burridge.
—22 Henry Holt Henley,	John Burridge.
—27 Henry Drax,	John Burridge*.
—34 Henry Holt Henley,	John Scrope.
—41 Henry Holt Henley,	John Scrope.
—47 Henry Holt Henley,	John Scrope.
—54 Thomas Fane,	Henry Fane.
—61 Thomas Fane,	Henry Fane.

* Ousted upon petition, and Mr. Henley seated.

the

the settled usage, they take it for granted, and endeavour to reconcile the defects of their case to their object, by arguments of presumption in favour of the usage. But the fallacy consists in begging the question: Their evidence by no means establishes either the original institution, or actual custom of the borough, to have been what they state.

The counsel for the petitioners are much perplexed, in endeavouring to explain the early returns, in as to suit their purpose; but it is impossible for any art to reconcile them to it. Taking them all together, (a method which they themselves offer) they purport in plain terms, that the *inhabitants* therein mentioned were a distinct class of persons from the other electors. Whether by right or wrong, they certainly took part in those elections. All rules of grammar must be set aside, before the Committee can believe, that the expressions, "burgesses *and* inhabitants," "burgesses *with* inhabitants," or, "*on behalf of* inhabitants" could be employed to describe burgesses only. The return in 30 Eliz. which differs from all the rest, explains the true reason of adding the inhabitants in them. This form is most probably the truest, because it is most reconcileable to the legal constitution of boroughs, and to the known state of them in those days. According to this
return,

return, the *corporation* choose the members, "for and on behalf of all the inhabitants and commonalty." If the different forms of these several returns can be reconciled at all, this expression leads the way to it. But it is better perhaps to agree with the observation of Serjeant Glanville * and the Committee, in his report of the case of Blechingly, "*that the forms of the indentures made in the country by ignorant people, or transcribed peradventure from some borrowed precedent of another borough, where the election is different, are not conclusive.*"

Thus, as far as the antient returns go, their forms lead to no certain opinion. After this period they are silent on this point till 1656, when during the protectorate, the attorney general of Cromwell, is returned under a form

* Glanv. p. 35.—In p. 56, in the case of Chippenham, he enlarges upon this observation thus—"Such arguments as may be made to conceive the right of election, or who ought to be electors, out of the forms or words of indentures, ought not to be regarded, where the usage and custom of the elections hath not concurred with the forms of such indentures; for the reasons delivered in the case of Blechingly, and more strongly in this case. For in that case, the arguments out of the words *Et alii homines*, tending to give a greater number of burgesses or inhabitants, interest in the election, (which liberty the law favoureth) were not regarded, but rejected, in a case where by *constant custom and usage*, the election stood restrained to a limited and qualified number." See vol. i. p. 15. note D.

dis-

different from those before and after it, by *burgesses inhabitants*. Any acts of such a period are unfit to be regarded as precedents. The pains taken by Cromwell to pack a parliament are well known; and the measures he pursued for this purpose, were as illegal in the conduct of elections, as afterwards in his violence upon the members. His attorney general is not likely to have been backward in the execution of his schemes. Yet in the return of the same person in 1641, there is no mention of *inhabitant burgesses*; and that return is made *secundum consuetudinem burgi*.

The nine returns intervening from 1698 to 1714, in the short space of 16 years, in which inhabitants bear a part, are contradicted by almost all the preceding, and what is more important, by every one made within the last 70 years; by various entries in the corporation books; by the general constitution of boroughs, and by the policy of the law.

The only two returns in the whole course of time, consistent with those of these 16 years, are that of 1656, which has been observed upon, and that of 1 Eliz. which is unlike all the rest of the same reign.

By the bye-law of 1580, both inhabitant and not inhabitant burgesses, are to elect the mayor. Now if a corporate meeting for the mayor's election

election was attended by the foreign freemen, and at a time when this office, perhaps, raised more competition than that of representative, can it be doubted that every other meeting was attended by the same persons? A few years after this they pass another bye-law, to compel the foreign burgessees to contribute to the members' wages. At an election after this resolution, would they who passed it think of refusing the votes of those, upon whom they had imposed the duty? It has been urged, as a powerful argument on the other side, that a right of election once proved to have existed, can never be lost: Here is plainly a right not only proved to belong to non-residents, but actually forced upon them. This right not only existed in antient, but has been exercised in modern times; and according to the memory of their oldest witness, has been always so.

The books contain the admissions of many persons notoriously non-resident. It is in vain that the counsel for the petitioners would endeavour to draw a distinction between the voting in what they call corporation business, and that of elections to parliament: The right to attend both must be the same in this borough. It cannot be conceived, that after the corporation had admitted these persons into their community, without restriction, they would pre-
sume

sume to restrain their exercise of all the privileges they possessed.

On the other hand, they say, the freeman's oath contains articles that necessarily imply the residence of those who take it; and that it is absurd to think, that those who are bound to contribute to the charges of a borough, should live elsewhere. In the origin of boroughs it might be natural for their burgesses to be inhabitants; but it was by choice, not compulsion. This at best is only the speculation of antiquarians; but it can never be used as an argument, in a question of positive institution, or in the determination of legal rights. The oaths of every borough are framed upon the same plan; and this argument would prove the necessity of residence to every burgess, in London, Bristol, Liverpool, and every great town in the kingdom (C.)

This would be a sufficient answer to the argument, if the authority of this oath had warranted it: But it does not. The oath first appears about the time, when the above bye-laws passed, which are directly opposite to the sense which the petitioners put upon it; and it likewise wants that quality which the oaths of a prescriptive corporation should possess, of being prescriptive *. This oath contains a clause to

* The reader is desired to attend to this observation in reading the latter part of the Liverpool oath in note (C.)

prohibit a resorting to *conventicles*, and therefore must have been subsequent to the reformation, and most probably had its beginning in the reign of Elizabeth. In the same manner, their honorary oath wants a legal foundation. It can only be accounted for, by supposing it introduced on a particular occasion; perhaps in compliment to the lord lieutenant, with whose admission it is first mentioned: It is heard of only for a few years, and then sinks into oblivion, having never been used in modern times. The books of this period contain other marks of practices to favour the claim of the residents then first beginning to shew itself. Some persons are admitted freemen *quam diu in villa vixerint*, a form not to be found before or since *, and which furnishes an argument, that without it a general right would have followed of course.

The proclamations are open to the same argument. Their first appearance is very suspicious: It is without date, and in a book beginning with 1698. A little before this time, the claim of the residents was first set up, and in this year the first of those nine returns was made, which favour their pretensions. The

* I believe the counsel for the fitting members, did not produce any of these entries in their evidence.

temporary and occasional institution of these proclamations, is proved by their never having been used within the memory of man.

The restriction contended for is contrary to the original institution of boroughs. This may be seen in Brady *, who says, " A free burgh, in the true sense of the word, was only a town of free trading, with a merchant gild or community, without paying toll, pontage, passage, stallage, &c. And a free burgess was no other than a man that exercised free trade, according to the liberties and privileges of his burgh, *whether he resided in it*, or whether he had liberty to live and trade elsewhere." This passage also shews what the old policy of boroughs was. Antiently some statutes passed, which required voters to be resident: but they were found to be such burthen some restrictions, that they were soon neglected in practice; and lately the legislature, by repealing them all †, has declared its sense of their injustice. The usage of almost every considerable town is likewise contrary to it.

What then should induce the Committee to determine in favour of the petitioners? Where does the strength of their case lie? It is not in the returns taken collectively and fully weighed,

* Folio edit. p. 47. Octavo edit. p. 100.
14 Geo. III. c. 58.

† Stat.

nor in the books of the corporation, nor in the principles of law, nor in experience.

Their proposition extends largely to both classes of voters, and both are supported by the same arguments; if therefore they fail in either, they must lose both. If residence should be thought necessary to *freeholders*, this will be, perhaps, a singular instance of it, and which no borough in the kingdom requires. It is the soil which gives the privilege to freeholders, and the owner carries it with him as long as he possesses the estate. It would be strange if a right, different from every other in the kingdom, and which no man ever knew to be exercised, should be established at this day. The charter of Edw. I. from which the petitioners deduce the claim of freeholders, refers to the customs of Melcombe and London; and conveys to Lyme the same privileges: Yet it is well known, that in those places no residence is required of the voters*.

* There is no resolution of the house ascertaining the right of election in Weymouth and Melcombe; and I do not know enough of the usage there to speak of it accurately. But upon the trial of the contested election in 1730, the counsel on both sides agreed to the following statement of it, viz. "In the mayor, aldermen, bailiffs, and capital burgesses, *inhabiting in the borough*, and in persons seised of freeholds within the borough, and not receiving alms." See 21 Journ. 574.

The Committee certainly will not, in such a case, be guided by the loose evidence offered to prove the residence of those who signed the returns in the last century. The connection is so uncertain, as to be unworthy of any regard. The counsel themselves are so sensible of it, that they are obliged to resort to presumptions from what they call the general usage, to support it; which usage is not otherwise proved than by the certainty of this connection. In one instance a man described "of Lyme," 57 years before the same name appears in a return, is inferred from thence to be the *same* person and inhabitant at the time of the return; another serving constable 25 years before; another described "of Lyme" 21 years before; with others whose connection is not nearer than 16, 14, and 8 years. After putting together many such instances, the Committee are told, it is wonderful that their case has been so clearly made out.

But even admitting the connection with these returns has been proved, the conclusion does not follow from it; because, in all the returns to which this reference is made, except three (30 Cha. II. 1 James II. and 2 Will. and Mary) the only persons signing were capital burgessees*;

* This fact had been mentioned by the counsel for the sitting members, while the other party were producing their returns in evidence, and not denied by them.

their number never exceeds 10; and in one instance is 4, in another 6. It cannot be believed, that the voters present at these elections either were so few, or consisted alone of capital burgesſes, and of only a part of them. It is only in modern times that a custom was introduced in this town of signing returns by a conſiderable number. More antiently none but the principal perſons put their names to them; and frequently the ſeal was affixed without any ſignatures. It is natural that the capital burgesſes ſhould have been reſident in the town, though it by no means follows that the others who voted in theſe elections were ſo: But even of the capital burgesſes, not more than two-thirds were ever preſent at the elections, if theſe returns are to be taken according as the neceſſity of the petitioners' caſe requires.

Again, even if theſe obſervations on the returns were not true, it would be unjuſt to give them the effect contended for; becauſe it would be impoſſible for the oppoſite party, at this diſtance of time, to prove negatively that ſuch perſons did not, at the times referred to, live in Lyme. When the caſes of Malden and Wincheſtea were agitating in the court of King's Bench, by *quo warranto* informations, the court ſtopped the proceedings of that party, which required the corporators to prove their reſidence
only

only 20 years before; yet here the sitting members are called upon to shew where certain burgesses of Lyme resided upwards of 150 years ago.

The evidence of the witnesses in this cause, who are produced to establish the usage and reputation, proves that during all their time the usage has been contrary to their ideas of the reputation. They cannot produce an instance of refusing the vote of a non-resident; but, on the contrary, speak of one voter notoriously so, who used to vote. One single instance so avowedly adverse to the position of the petitioners, would be sufficient to overturn it, in a case supported as that of the sitting members is by uniform and established possession. As to the fact mentioned by Jurdan, of Scroope's transaction with his father, *all* the circumstances of it are probably unknown; but as it stands, it may be accounted for by supposing that the voter's presence in the town might make him a more active and useful friend of the candidate than his situation out of it would have allowed. It should also be considered, that Scroope was then but newly come to Lyme, and of course not well informed of its constitution.

The counsel on the other side wish to consider the transactions of the last 70 years as a blank in this cause; but they will not bear this

construction. If duly considered, they would afford security to a title much less reasonable, and less clearly established, than that of the fitting members. In this period there have been two contested elections, in which the parties have been fully opposed to each other, and they have proceeded in both to a poll. In 1727, Henley stood upon the right of the freemen; the petition presented against him was abandoned. In 1747, after the freeholders had made strong exertions, they were deserted by the candidate whom they had collectively supported, who was afraid to put their claim to a trial. It may be said, that acts of candidates are not to determine the rights of electors; but surely, if Scroope's conduct to Jurdan is to be relied upon, on the other hand, Drax's running away is equally material to the cause: But if the freeholders in 1747 had thought their right worth maintaining, they might have petitioned the house against their opponents. It is plain they considered their cause as desperate, and relinquished it: Therefore it cannot, with any propriety, be urged on the other side, that *no proper opportunity* has occurred within these 70 years for bringing the question to issue*.

Thus

* The following proceedings in the Journals were not produced to the Committee, nor mentioned in the arguments: They shew, that the claim of the freeholders was again brought

Thus from 1714 to the present day, the party of the sitting members has held the sole exercise of the privilege contended for; which has been confirmed by a select Committee of elections, after a full and laboured investigation. When

brought forward, and again relinquished, in more modern times. In 20 Journ. 17, are three petitions from Lyme after the general election in 1722, when Henley and Burridge were returned: One from William Smith, Esq; complaining of the election of Burridge, and of his want of qualification; another from a Mr. Parish, objecting to the votes for Burridge and Smith, to the former's want of estate, and to the irregularity of the election, as being had without due notice. Neither of these states any right of election; but the third is from *several freeholders, inhabitants*, in support of Parish, complaining of Robert Burridge, the mayor, for having refused their votes. In the same volume, p. 159, 2d of March, 1722-3, Parish has leave to withdraw his petition. The other two petitions were not heard in that session. In the next, Smith renewed his petition, (p. 346) but the freeholders did not renew theirs, Smith, soon afterwards, had leave to withdraw his petition, (p. 383.)

After the general election in 1727, besides the petition of Henley and that against him, as before mentioned, William Smith, Esq; *one of the freeholders* of Lyme, petitioned the House in behalf of the freeholders, complaining of the mayor for having refused their votes. 21 Journ. 35. The Committee of elections was not instructed to consider of this petition, at the same time with the others, relating to Burridge and Henley; and therefore took no notice of it in their report to the House. It does not appear that proceedings were had upon it; and I can find nothing further relating to the petitioner in the Journal.

the counsel for the petitioners venture to justify their attempt in questioning this judgment, by the practice of the courts in Westminster hall, they should at the same time bring with them, into this judicature, the rule of limitation, by which all causes there are governed. A claim, dormant 60 years, could not make its appearance in the ordinary courts of law.

Another argument offered for this attempt is drawn from the constitution of election committees, by which many members may differ from the majority : But this notion would pervert every political institution made up of numbers. It is the judgment of the *court*, not of the *majority*, by which a cause is determined.

It is of the utmost importance, and a fundamental principle in judicature, to regard former determinations of courts of justice. If not proved to be wrong, or even if the question were doubtful, they ought to have authority as precedents. The decisions of this modern tribunal ought not to be treated with disrespect ; for if its authority is not vigorously maintained, the national benefit expected from its institution will be lost.

Reply.

The counsel for the petitioners
observed in reply,

That it was fallacious, in any case where rights
of election to parliament are depending, to rely
upon

upon the argument of length of possession. These rights are not of a private nature, nor cognizable in the ordinary courts of justice; and therefore not to be governed by the technical principle of length of possession, and terms of limitation, which are peculiar to those courts, and to the claims determined there. In questions of private rights, there is not only a period of limitation to inquiry, but the law has also established rules of presumption in aid of long possession. Thus from long acquiescence, it may be presumed, that a party has either sold, or renounced his property; but such presumption cannot have place where the subject in dispute is a *public* right, which the possessor cannot alienate. The case of Pontefract is an illustration of the truth of this principle: There the uniform practice of the last 150 years, agreements of contending parties in support of it recorded in the journals, and decisions in parliament on the same side, were held insufficient to overthrow the fundamental constitution of the borough *. So in the case of Agmondesham, and three other boroughs reported by Glanville †, though the right was suspended from the reign of Edw. I. to that of Cha. I. it was held not to be abolished, and was again brought into use.

* See Vol. I. and 1 Doug. elect. 379.

† Glanv. 87.

The chief evidence by which the sitting members controvert the necessity of residence, consists of the two entries of 1580 and 1584. By the first, burgeses, *not inhabitant*, are allowed to vote for mayors; in the same entry, those who have *free burgages in right of their wives*, are likewise to have that privilege. Now the counsel on the other side, if they rely on this authority, must take its whole effect; but they will not be willing to admit, that freeholders may vote even for a mayor: Besides, this regulation was opposed by one of the old members; and even allowing it full weight, it relates only to the elections of mayors. Corporations have power to regulate their own internal œconomy, and may prescribe the terms of the elections in their own body; but they cannot controll the right of voting for members of parliament. That must remain according to its original institution.

The other entry subjects to the burthen of paying the members' wages *all* the inhabitants, as well as the foreign freemen. This, like the former, proves too much, and establishes the same right in the inhabitants at large, as in the freemen. This bye-law, therefore, plainly lays the charge on a set of persons who never exercised the right of election. At most, it is only an act of the corporation, and an attempt by them to make others contribute to discharge their

their burthen. It is evidently a *new* constitution; for if all the inhabitants voted, this bye-law was not necessary; they were compellable by law to have paid the duty.

It has been endeavoured to do away the effect of Mr. Scroope's conduct in 1734, by alledging, that he was then a stranger to the borough, and ignorant of the state of its constitution: But this does not affect the argument drawn from it; because, though *he* might be uninformed, his agents and friends, by whose advice he acted, must have known and respected that general opinion which he followed.

The word *burgensis* in the books, has been said to mean "a freeholder *admitted to the freedom*." If so, what possible reason could exist for distinguishing the two classes in the rolls and entries? The word *freemen*, in that case, would include all the electors. The contradistinction of the two classes can only be explained by supposing, that *freeholders* in that character alone, did the acts in question; and this made it both necessary and just to preserve memorials of them in this form. The entry of the election in 1613-14 is absurd, and without meaning, if the terms of it are to be explained in their sense of the words. "*Freemen and freeholders*" could not have been used to describe freemen only.

At the time of Charles the Second's charter, the freemen had begun their practices to exclude the freeholders; the support of their schemes might have been a principal object in granting it. But even that does not venture to give the privilege to freemen exclusively, without colouring it with the appearance of antiquity and prescription. The recital *sicut antea*, &c. must have been known to be false by those who suggested it: But it was also known, that the charter could not be effectual to this purpose, without referring to antient usage; because the crown cannot alter the established right of election. It was also made at a time when the government of Cha. II. was garbling corporations, and therefore to be suspected, if it were still in force. But no part of this charter ought to have any force, because it was completely annulled by the king's proclamation; and at this day should be rejected with indignation. It is remarkable, that the election next after the cancelling of the charter, was made expressly by *freemen and freeholders*.

No argument of weight can be drawn from the non-prosecution of the petitions in 1701 and 1708. In the former case there was no abandonment: The petition could not be heard in the first session; and before the next, the death of the king occasioned a new parliament. The same delay attended the petition in 1708: At
this

this time parliaments were triennial; and parties who had only two sessions to gain by petitioning, and perhaps only a small portion of one of them, may be supposed to have declined the struggle from prudence, and not from a diffidence in their claims. Their views might have been better directed to the approaching new election.

The counsel for the sitting members are much mistaken in supposing that the claim of residence to freeholders is peculiar to the present contest. In Haslemere, Cricklade, Tavistock, and Guildford, and perhaps in other boroughs*, the right of voting is so qualified. The customs of these places shew the claim not to be unconstitutional.

Their argument drawn from the use of the common seal in the returns is equally ill founded. There are many boroughs where the right of voting is not in members of the corporation, or not alone in them, where the returns are executed under the common seal of the corporation. Indeed it is the general practice, where the mayor is the returning officer. In Reading†, where the right of voting is in the inhabitants, paying scot and lot, and the corporators, *as such*, have no right; and in Bridport‡, where there is the same right, the returns have been always made with the seal of the corporation.

* Westbury is another. 18 Journ. 154. † Prynn
Brevia Parl. rediv. 284. ‡ 29 Journ. 204.

The Committee having deliberated on the case, determined, "*That the right of election for the borough of Lyme is in the freemen only, as well non-resident as resident.*"

This resolution was communicated to the parties. In consequence of it, the Committee declared

The sitting members duly elected.

Of which the chairman informed the House on the same day, February 21 *.

* Votes, p. 174.

N O T E S

ON THE CASE OF

L Y M E.

PAGE 1. (A.) Mr. N. Bond also appeared as counsel for the electors; but it being intimated, that some members disapproved of hearing *two* counsel for the electors, Mr. Bond desired to know the opinion of the Committee on the propriety of his attending there on behalf of his clients. Hereupon the Committee came to a resolution to hear only two counsel for the candidates on each side, and one counsel for the electors petitioning: In consequence of which, Mr. Bond did not appear in the cause.

Committees, in these matters, act according to their own discretion upon particular circumstances. In the former case of Lyme, two counsel were heard for the electors, as well as for the candidates; and *three* also were heard on the part of the sitting members; one of the three being nominally counsel for the electors in their interest. The same has been done in other cases.

By a standing order of the House, the old election Committees were directed to admit but two counsel of a side to be heard; (13 Journ. 648) but the present Election Court is not subject to the former orders of the

the

the House; though it is found convenient on many occasions to comply with them.

P. 29. (B.) If the real state of the elections of Members of Parliament, in this and the preceding period, had been faithfully entered on record in the simplicity which directed this, we should probably find many others like it in the registers of corporations. In some counties the Lords Lieutenants pretended to have a controll over the elections, in the several towns, as to one member; which character, perhaps, the Marquis of Winchester held at this time in Dorsetshire. In the election next preceding that in question, one of the members returned was of the *Paulett* family.

Sir Nicholas Throckmorton, and *Francis Walsingham*, Esq; the names of well known courtiers, having no connection with the borough or county, likewise represented Lyme in the reign of Elizabeth.

I have observed, that the name of the second member in the old returns, has generally been one of a family well known in the town, occurring frequently in the lists of freemen, as *Hassard*, *Ellsdon*, &c. with the addition of *merchant*, or without any addition. The name of the other member is generally that of a stranger, with the addition of *Esquire*.

Even so late as the revolution, it was thought necessary to abolish, by act of parliament, the custom, by which the Lord Warden of the Cinque Ports claimed a right to name one of the members for each port. The preamble of the act recites their pretending and claiming of right this power of nomination; and enacts, " That all such nominations, or recommendations,

mendations, were, and are, contrary to the laws, &c." Stat. 2. Will. and Mary, sess. 1. ch. 7. A bill for the same purpose had been prepared in the preceding parliament, in 1689; but it was dissolved before the bill was ready for passing.

Brady, in the appendix to his Treatise on Boroughs, (N^o 23 and 24) has preserved two curious instruments upon this subject; in one of which the lord, in the other the lady, of the town of Aylebury, actually execute indentures of the return of members, in their own names and right, in a form similar to that of a power of attorney. Brady cites them from the bundle of writs in the rolls chapel, in the 14th and 28th years of Elizabeth. In the latter instance, the lord of the borough condescends to name the corporation as a party to the return, together with himself; but in the former, the lady alone appoints the members.

The first case upon record of an election petition, which happened in the reign of Edw. II, states one of the knights for Devonshire to have been returned by the *bishop of Exeter*. It is remarkable, that the *petitioning* candidate alledges himself to have been so elected—"the said Matthew, by the bishop of Exeter, and Sir William Martin by the assent of the good men of the county, were elected, and to the sheriff in full county presented, &c." This petition is preserved in the preface to Glanville's Reports. It is addressed "To the council of our lord the king," and is not likely to have founded the petitioner's claim upon a practice contrary to the then received notions of right.

P. 79. (C.) The liverymen of London, before the year 1725, used to take the following oath upon their admission to the freedom: "Ye shall swear that ye shall be good and true to our sovereign lord king George, and to the heirs of our said sovereign lord the king. Obeisant and obedient ye shall be to the mayor and ministers of this city. The franchises and customs thereof ye shall maintain; and this city keep harmless in that that in you is. Ye shall be contributory to all manner of charges within this city, as summons, watches, contributions, taxes, talliages, lot and scot, and to all other charges, bearing your part as a freeman ought to do. Ye shall colour no foreign goods, under or in your name, whereby the king or this city, might or may lose their customs or advantage. *Ye shall know no foreigner to buy or sell any merchandise with any other foreigner within this city or franchise thereof, but ye shall warn the chamberlain thereof, or some minister of the chamber. Ye shall implead, or sue no freeman out of this city, whilst ye may have right and law within the same city. Ye shall take no apprentice; but if he be freeborn, that is to say, no bondman's son, nor the child of any alien, and for no (for any*)* less term than for seven years, without fraud or deceit; and within the first year ye shall cause him to be inrolled, or else pay such fine as shall be reasonably imposed upon you for omitting the same. And after his term's end, within convenient time (being required) ye shall make him free of this city, if he have well and truly served you. Ye shall also keep the

* Words substituted for those in *Italic now* omitted.

king's peace in your own person. Ye shall know no gatherings, conventicles, nor conspiracies, made against the king's peace ; but ye shall warn the mayor thereof, or lett it to your power. All these points and articles ye shall well and truly keep, according to the laws and customs of this city, to your power.

So God you help."

By stat. 11 Geo. I. ch. 18. made for altering the constitution of the city in elections, and regulating them, a particular provision was made (in sect. 19,) for omitting the words in *Italic* from this oath.

I believe there is much uniformity in corporation oaths: As their privileges were chiefly intended for those who resided within their jurisdiction, it was natural to prescribe their duties to them in terms adapted to this situation. In Bristol and Liverpool, where likewise residence is no qualification of the right of voting, the oaths of the freemen are of the same tenor. As these places were particularly referred to in the arguments, I have procured copies of the oaths taken in them by their freemen upon admission; which are as follows:

The Oath of a Burgefs of Bristol.

" You shall be good and true unto his majesty king George and to the heirs and successors of the said king: And to the lieutenant, master mayor of the city of Bristol, and the ministers of the same, in all causes reasonable, you shall be obedient and assistant. You shall keep the franchises and customs of this city; and also the king's peace here you shall endeavour yourself to keep and maintain. You shall be contri-

butary to all manner of summons, as watches, taxes, lots, scots, and other charges within this city, to your power. You shall know none unlawful assemblies, riots, or routs, purposed to be made against the king's laws or peace; but you shall withstand them to your power, or warn master mayor for the time being thereof, or some of the head officers of this city, as speedily as you can. You shall not colour the goods of any foreigner or stranger, or know any foreigner or stranger to buy and sell with another foreigner within the precincts of this city, but you shall give knowledge thereof to the chamberlain, or his deputy, without delay. You shall not implead, or sue any burgess of this city in any court out of this city, for any matter whereof you have sufficient remedy within this city. You shall not take any apprentice that is bond of blood, and none other, except he be born under the king's obedience, and for no less term than seven terms; and that he be bound by indentures, to be made by the town clerk of this city, for the time being, or his clerk; and at the end of his term, if he have truly served you all his term, you shall, if he require you to it, present him to master mayor, or to the chamberlain, to be made a burgess. You shall not wear, or take the livery or cloathing of any lord, gentleman, or other person, but only your own, or your crafts, or of master mayor, or of the lord high steward of this city, or of the sheriffs of the same, so long as you shall be dwelling within this city. You shall make no oath or promise, by way of confederacy, contrary to the king's laws.

So help you God by the holy contents of this book."

The

The Oath of a Freeman of Liverpool.

" You shall be a true and faithful subject to our sovereign lord the king's majesty, his heirs, and successors; and no treason do procure or commit, or cause to be done procured or committed within this town and liberties thereof. You shall also, from time to time, (as occasion shall require) aid, assist, and obey, as well the mayor of this town, as also all other his majesty's officers within the same, under the said mayor, in the due and lawful execution of their several offices; and especially concerning the preservation of his majesty's peace, the observation of good orders, and the antient and laudable privileges, franchises, liberties, and customs of the same, which said liberties and customs you shall further and increase, to your knowledge and best endeavours. You shall likewise by no covin, colour, or deceit, free any foreigner, or the goods, chattels, or merchandize, of any foreigner or other person whatsoever, not free within this town, in the name of your own proper goods, chattels, or merchandize, whereby the customs of this town may be impaired, hindered, impeached, delayed, or embezzled. You shall be liable and contributory, at all times necessary and convenient, to all reasonable taxations and payments, which shall be assessed upon you amongst other burghesses, freemen, and inhabitants of this town, as well for the maintenance and furtherance of the franchises and liberties of this town of Liverpool, and other necessities thereunto incident and appertaining; as also for the reparation* of the parish church of St. Peter and the parochial chapel of our Lady and St. Nicholas within the same.

* See the note in p. 79.

“ And further, you shall not implead or sue any free-man of this town, inhabiting within the same, for any matter, cause, or thing whatsoever whereof the said mayor’s court may hold plea, out of the jurisdiction of this court, unless it be for want of justice or right there to be administered.

“ And if you shall know or hear of any unlawful congregations, conventicles, riots, routs, unlawful assemblies, or other disorderly tumults to be had or made, or like to be had, made, or procured, by day or by night, within this town and liberties of the same, to the disturbance of the peace of our sovereign lord the king’s majesty, his heirs and successors, you shall give warning and notice thereof to the mayor, his deputy or bailiffs, with all speed. And all and every other thing or things, which shall either touch or concern the advancement or preferment of the commonwealth and state of this town, or shall appertain and belong to be done by good and honest burgessees freemen and inhabitants of the same, you shall for your part do, accomplish, fulfil, perform, and observe, to the best of your ability, power, knowledge, and wit.

So help you God.”

In 1 Keb. 690, a case in which the Bristol oath came under the consideration of the court of King’s Bench, the judges held that clause of it which confines the prosecution of suits to the city courts, to be illegal. This happened in the year 1664; yet that clause has been regularly preserved in the oath ever since. A similar one is in the Liverpool oath, and in others; and made part of the London oath till taken out

out of it by the statute as abovementioned ; for reasons which ought to have extended the same alteration to every other.

By comparing the above oaths with that of Lyme, in the article of unlawful assemblies, it is plain that the word *conventicles* there used, has not the meaning which the counsel ascribe to it in p. 80, by which modern times appropriate it to religious meetings. Before the reformation, it made part of the London oath in its more enlarged sense of *unlawful gathering of people without tumult.*

THE HISTORY OF THE

REIGN OF THE

EMPEROR

OF THE

WEST INDIES

IN THE

SEVENTEENTH

CENTURY

BY

J. G. B. B.

OF THE

UNIVERSITY OF

OXFORD

IN TWO VOLUMES

VOLUME I

THE

REIGN OF

THE

EMPEROR

OF THE

WEST INDIES

IN THE

SEVENTEENTH

CENTURY

BY

J. G. B. B.

OF THE

IX.

THE

C A S E

OF the BOROUGH of

S A L T A S H,

In the County of CORNWALL.

The Committee was chosen on Thursday the 14th Day
of April, 1785, and consisted of the following
Members:

Lord Viscount Beauchamp, *Chairman.*
Dalhousie Watherstone, Esq;
Sir Philip Hales, Bart.
Hon. William Grimstone.
William Southeron, Esq;
William Middleton, Esq;
William Jolliffe, Esq;
John William Egerton, Esq;
Henry Beaufoy, Esq;
Philip Metcalfe, Esq;
John Galley Knight, Esq;
Isaac Hawkins Browne, Esq;
Thomas Samuel Jolliffe, Esq;

NOMINEES.

John Pollexfen Bastard, Esq; *Of the Petitioners.*
John Strutt, Esq; *Of the Sitting Members.*

PETITIONERS.

Lord Strathaven, and John Curtis, Esq;

Sitting Members.

Rt. Hon. Charles Jenkinson, and Charles Ambler, Esq;

COUNSEL.

For the Petitioners,

Hon. Mr. Erskine, and Mr. Lawrence.

For the Sitting Members,

Mr. Wilson, and Mr. Douglas.

T H E

C A S E

Of the BOROUGH of

S A L T A S H.

THE petition alledged in general terms, that the mayor of the borough had illegally received the votes of persons who had no right to vote, in favour of the sitting members; and had rejected a greater number of good votes, tendered for the petitioners, whom he ought to have returned *.

The question between the parties was, whether the right of election belonged to the members of the corporation, or to the freeholders of antient houses or their scites within the borough, held by burgage tenure. The petitioners supported the latter sett of voters; the sitting members were chosen by the former.

The poll contained only the votes for Mr. Jenkinson and Mr. Ambler, of which there were eleven for each; but 45 persons had tendered their votes as freeholders, for the petitioners, and had been rejected. It was agreed,

* See 40 Journ. 19.

that

that if the freeholders had the right, the petitioners would be intitled to the seat; and that if not, the sitting members must be declared duly elected.

There is no resolution of the House of Commons, upon the right of election in this borough. The present contest is the third, in which it has been disputed before a select Committee, since the year 1780. The first arose upon the general election in that year; after which two petitions were presented to the house from the unsuccessful party: One by the candidates, in general terms: Another by certain freeholders of the borough, stating their right to elect. They were tried in the second session of that parliament, and the Committee determined in favour of the sitting members, but did not declare any express resolution upon the rights of the electors *. The second contest arose upon an occasional vacancy of one of the members, in the spring of 1783. Two petitions were also presented to the house, against this election; that of the candidate, as before, was framed in general terms; but that of the electors in his interest, stated the right of election to be in *freeholders and free burgesses, holding by burgage tenure*. This trial ended like the former, unfavorably to the petitioners †.

* 38 Journ. 595, 663.

† 39 Journ. 385, 427,

The

The evidence stated in support of the present petition, was said to consist of the same written particulars as upon the former trials; with the addition of one article, which (as will be seen in the course of this report) the petitioners considered as very important. Some witnesses were also examined, who did not give evidence to the former Committees.

The counsel for the petitioners in opening their case to the court, related the circumstance of the two former trials having ended unfavourably to their side; and that the same question, as was then agitated, was to be determined now for the third time. The counsel for the sitting members, endeavoured to take advantage of this declaration, on the second day of the trial, while the petitioners were proceeding in their evidence; which they interrupted by an objection, supported by the following arguments, viz.

That after two trials had upon the same question before two former Committees, and two concurring judgments by them, in favour of the right asserted by the sitting members, it would be improper, in the present Committee, to suffer the question to be again agitated. That the state of the case, as now opened for the petitioners, did not in substance vary from the former. That the maxim *fit finis litium*, was always

always enforced in suits in Westminster hall, after two concurring verdicts; although the jurisdiction of a jury extended only to matters of fact, and a verdict was not recorded as a judgment; but in this case, there had been two judgments of a court which united the authorities both of judge and jury.

That certainty was a fundamental principle of justice, which could never be established without placing implicit confidence in preceding judicial decisions. Upon this principle, the judges revered many doctrines as unalterable, which would not be followed, if they were to arise in the present day out of new cases. That in a great conveyancing question, determined some years ago in the King's Bench, the judgment had not given entire satisfaction to the profession; and a few years afterwards, the same question arising again in another cause, one of the parties was about to oppose the doctrine of the former case: But the judges of the King's Bench would not suffer it to be argued; because the former decision had been received and acted upon as law*.

That if this principle were not enforced in the same manner in committees of election, there

* The cases alluded to were those of Coulson and Coulson, Stra. 1125, and Hodgson and Ambrose, Doug. Rep. 323.

would

would be no end to litigation, because twelve decisions might be as dissatisfactory to the losing party as two; and the benefit expected from Grenville's act, would by this means be, in a great measure, lost: Because, instead of introducing order into the law of elections, it would open the way for all those inconveniences which the fourth section of 2 Geo. II. c. 24, intended to prevent.

That fortunately for the sitting members, there had been instances in election committees of their following the doctrine now contended for. In the Shrewsbury case, in 1775, 1 Doug. elect. 464, two verdicts upon mandamuses had established a right in the freemen of that town as prescriptive, which the petitioner there contended for; and the sitting member wanted to establish the contrary, by evidence shewing that the supposed prescription began in 1642, by a bye-law that had been since repealed: But the Committee considered themselves bound by the verdicts, and would not receive the sitting member's evidence. Yet one of these verdicts had not been agreeable to the opinion of the judge who tried the cause.

That the present case was much stronger than that, inasmuch as the judgments whose authority is contending for, passed in the *same* tribunal which now tries the question for the third

time. It was said, in the Shrewsbury case, that the verdicts were not conclusive, because between different parties; as it might be argued here, that the present petitioners are not the *same parties* as contended before; but the Committee thought the *question* the same, and determined accordingly. In the Downton case, tried in 1781*, the question was, Whether a certain class of votes were occasional and void: The same question had before been discussed and determined by a Committee upon the Downton election, in 1779; and upon that authority the Committee in 1781 came to the same opinion. Upon that occasion the chairman †, whose parliamentary knowledge is well known, informed the counsel who brought forward the question, “that though the Committee had not reported their petition to be frivolous, they had thought it very improper, after one Committee had decided the point, to agitate it a second time.”

That it was particularly necessary to support this doctrine in discussing the rights of maiden boroughs, which offered so many opportunities for contest. In the case of Pontefract, indeed, there had been a third petition in opposition to two former decisions: But one of these had

* See Vol. I. p. 113.

† The right hon. Frederick Montague.

passed

passed *in the house*, and the question turned on the entry of a last determination in the Journals; which, if really existing, is made conclusive by the law of the land, and could not be shaken by a multitude of decisions. Such a case can hardly ever happen again, and affords no precedent to this case.

In answer to the above arguments, the counsel for the petitioners said,

That the time of taking this objection was very extraordinary; the only proper opportunity for it being previous to entering upon the merits; that by suffering the inquiry to proceed, the counsel on the other side had admitted, as far as in them lay, the competency and propriety of it.

That there was no principle in the law which led judges to consider two verdicts as conclusive, merely because they might have concurred: That this related to the subject matter of them; for if any number of verdicts were to be given concurrently against law, they would always be set aside, and new trials granted; but where two verdicts may have ascertained a *point of fact* the same way, the courts justly suppose it vain to expect that another jury would think differently, and therefore establish that opinion in which 24 persons have been unanimous.

That the decisions of Committees were formed by a majority only of the members ; upon a view of the whole merits of a cause, involving law and fact, and consequently a variety of considerations together : That the foundation of such decisions was often not ascertained, and therefore could not always have the authority of precedents : But according to the positions on the other side, even though they were wrong, they must be implicitly followed.

That it had been currently said, that both the former decisions had been made by a majority of *one* member only in each Committee ; which, if true, shewed the point to be very difficult and doubtful, and that some more decided judgment was necessary to ascertain it.

That if by the law and constitution of England, the borough of Saltash were a borough represented in parliament in right of burgage tenure, no determination of a Committee could deprive it of this legal right ; therefore supposing the present cause to contain exactly the same evidence, and no more than the last, the Committee would be bound to hear it. But that on the present trial, further and stronger evidence would be produced in addition to the former.

That the case of Shrewsbury was very different from this : There the question upon a corporation

That the case alluded to in the King's Bench had determined a point of great importance to all the landed property in the kingdom; and many years had passed, in which many family settlements had been made, estates sold, and all the consequences attending the transfer of land had taken place conformably to that opinion. It was owing to these peculiar circumstances, and to avoid general confusion, that the judges resolved to consider the point as settled; not merely from regard to a single precedent. That these reasons were not applicable to the present case; no length of time having elapsed, no family settlements having been founded on it, and no general consequences being likely to result from it; in short, no symptom of acquiescence having

been held forth, and the first opportunity having been taken of renewing the cause.

That this attempt by no means militated against the principle of Mr. Grenville's bill; which purposely avoids making the decisions of this court final, leaving them to their own intrinsic merit to obtain that effect; and holding out to frivolous petitions the peril of the displeasure of the House, upon a report for this purpose, where the case may require it*.

That the former Committees did not declare any opinion of the right of election, but simply declared the sitting members duly elected; that therefore it may be inferred, they had some doubts upon it. The present petitioners were not concerned in the trial, and could not infer that *they* have no right, because a petitioner in a former case had failed.

That in the case of Pontefract, there had been two concurring decisions, one in the House, another before this tribunal; yet this did not prevent a third attempt, which succeeded contrary to them; has been confirmed in a fourth, and will, probably, for ever establish the right in Pontefract. That the determination of the *House*

* See on this subject the judicious observations of Mr. Douglas in Sect. II. of his Introduction. Doug. Elect. Vol. I.

upon this case was, at that time, a judgment of the only competent authority, and intituled to respect as such.

That the distinction alledged between questions upon the effect of a last determination, and any general question of right, had no real difference in it; in both cases, the right of election is in issue.

The Committee, after deliberating upon this point, directed the counsel for the petitioners to proceed with their evidence.

The following is a state of the evidence produced in support of the petition.

A charter of king Richard II. in the fifth year of his reign, (A. D. 1381) confirming one before granted to this town by Reginald de Valle tortâ, lord of the honour of Trematon within which Saltash stands, in the following words:

“ — *Inspeximus cartam quam Reginaldus de Valle tortâ dudum fecit liberis burgensibus de Effâ in hæc verba, SCIANT presentes & futuri quod Ego Reginaldus de Valle tortâ dedi concessi, & hac presenti chartâ meâ confirmavi liberis burgensibus meis de Effâ, omnes libertates & liberas consuetudines suas hîc subscriptas quas habuerunt tempore antecessorum meorum, viz.*

“ De pleno burgagio reddent sex denarios ad duos anni terminos, scilicet in vigiliâ natalis Domini tres denarios & in vigiliâ pasche frequenti tres denarios; & de dimidio burgagii reddent tres denarios ad predictos terminos. Et de forinsecâ terrâ reddent ad festum Sancti Michaelis quantum ad forinsecam terram pertinet.

“ Concessi eciam quod nullus predictorum burgensium implacitetur nec judicetur nisi in Hundredâ ejusdem villæ coram paribus suis. Et si ad iudicium perficiendum per se plenariè non sufficiant, per auxilium meum & meorum in eâdem Hundredâ perficiatur. Et nullus predictorum burgensium ex consuetudine sequatur hundredam nisi ter in anno, scilicet, die lune proximo post festum sancti Hillarii, & die lune proximo post clausum pasche & die lune proximo post festum sancte Fidei; nisi contra preceptum Domini Regis, vel pro efforciamiento iudicii si in placito fuerit; et tunc habeat summonicionem die sabbati, quod die lune sequenti veniat ad hundredam de placito in quo est responsurus. Et si aliqua summonicio de Domino Rege vel ejus ballivis evenerit, per summonitorem castri mei fiat illa summonicio preposito ejusdem villæ & postea per prepositum burgensibus.

“ Concessi eciam quod habeant prepositum suum per propriam electionem suam; & quod idem
habeat

habeat totum theolonium panis in eâdem villâ & redditum domûs suæ quietum pro servicio suo. Et quod nihil capiatur ad opus meum in eâdem villâ nisi per voluntatem mercatorum. Et si quis de predictis burgensibus meis in emendam meam acciderit, per sex denarios illud emendabit ad plus. Et quisquis illorum obierit de quâcunque morte fuerit, heres ejus catalla ipsius in pace habebit & terram suam per triginta denarios releviabit ad plus; et tamen emendabit vel releviabit burgensis de dimidio burgagii sicut burgensis de pleno burgagio.

“ Concessi etiam quod quieti sint ab omni tallagio & auxilio consuetudinario, nisi ad filium meum primogenitum militem faciendum, & ad filiam meam primogenitam maritandam *. Et habeant pasturam meam illis continuam quietam a festo sancti Michaelis usq. ad purificationem beate Marie. Si quis vero illorum predictam pasturam deinde exercere voluerit, det pro quolibet equo vel animali, unum denarium, & pro

* In the articles upon which Magna Charta was framed, the following stands the fifth: “ *Rex non concedit alicui Baroni quod capiat auxilium de liberis hominibus suis nisi ad caput suum redimendum & ad faciendum primogenitum filium suum militem & ad primogenitam filiam suam maritandam; & hoc faciet per rationabile auxilium.*” The lord who granted this charter lived in the reigns of King John and his son Henry III. and from the clause referred to here, I should conjecture it to have been subsequent to, but nearly coeval with, the great charter.

decem bidentibus unum denarium, salvis bladis & pratis & rationabilibus defensis meis.

“ Concessi etiam quod nullus de predictis burgenfibus meis capiatut aut ad castrum meum ducatur, si de transgressionem quam fecerit sufficientes plegios poterit invenire de paribus suis.

“ Et quod nulla navis contra libertatem ejusdem villæ transeat rupem de Essâ & rupem de la Hen' in Linario, ad aliquam mercaturam ad emendum vel vendendum. Et quod feria ejusdem villæ in mediâ villâ teneatur ubi consueverat tempore antecessorum meorum. Et quod nullus burgenfis per mare vel per terram itinerans impediatut de aliquo rationabili negotio suo quod cum vicinis suis facturum fuerit, si in eadem villâ catalla habuerit per quæ in eventu suo possit justiciari,

“ Has autem libertates & liberas consuetudines prescriptas Ego & heredes mei predictis burgenfibus meis & heredibus suis contra omnes homines & feminas warrantizare debemus. Quod ut ratum & inconcussum permaneat presentem Cartam meam sigilli mei impressione confirmavi. Hiis testibus, Johanne de Valle tortâ, &c.”

The words in which Richard II. * confirms this charter are, “ præfatis burgenfibus ac heredibus

* In the reign of Richard II. the honour of Trematon was become part of the Dutchy of Cornwall; and as such,
at

dibus & successoribus suis burgensibus villæ prædictæ.”

A charter of Queen Elizabeth, in the 27th year of her reign, reciting that of Valle tortâ, and three confirmations of it by Richard II. Edward IV. and Henry VIII. confirms them all in like manner; and adds, besides the form before recited from the confirmation of Richard II. “ prout iidem burgenſes & antecessores ſui libertates & quietancias prædictas & earum quamlibet ſive aliquam a tempore confectionis cartæ & literarum prædictarum rationabiliter uſi ſunt & gaviſi.” The charter then recites, that the ſaid burgeſſes, from time whereof the memory of man is not to the contrary, had held the aforeſaid rights and privileges, as well by preſcription as by the ſaid charters; and that, from the ſituation of the town, great inconvenience would ariſe for want of the privileges propoſed to be granted by this charter; whereupon the ſaid burgeſſes had petitioned her majeſty, for the better government of the ſaid town, to create them into another * body corporate: She therefore, for the purpoſes mentioned, conſtituted the ſaid town a free borough, and the burgeſſes of the ſame to be a body corporate, by the name of
at that time, veſted in the crown. Willis, in *Not. Parl.* cites *Dugd. Baron.* for this fact.

* “ *In aliud corpus incorporatum,*” in the original.

the "Mayor and freeburgesses of Saltash." The charter prescribes several particular regulations: Among others, that there shall be 10 aldermen, one of whom is annually to be chosen mayor, by the mayor, aldermen, and free burgesses; and when an alderman dies or is removed, one of the borough is to be elected by them in his room. It grants to the corporation the town of Saltash, with all its members and appurtenances; the ferry of the river, rents of assize, tolls, &c. together with all other profits and privileges which they had before held, yielding to her majesty, and her heirs and successors, Dukes of Cornwall, 181. Also, "that there should be, in the same borough, two burgesses of the parliament; and that the said mayor and freeburgesses for the time being, as often as a parliament should be summoned, should have power and authority to choose two discreet and honest men to be burgesses of the parliament for the same borough." The charter is silent as to the mode of election, or the qualification of free burgesses.

A survey, made in 1650, under a commission from the commonwealth, intitled, "Survey of the Borough of Saltash, with the rights, members, and appurtenances thereof, situate, lying, and being in the county of Cornwall, part of the antient dutchy there, and parcel of the possessions

sessions of Charles Stuart, late Duke of Cornwall, but now settled on trustees for the use of the commonwealth. Held as of the manor of East Greenwich in free and common socage, by fealty only. Taken by (*E. H. &c. the five commissioners.*)

The particulars are stated as following:

“ The high rents, or rents of assize, of the said borough

“ High Street—The heirs of Hutchin hold freely to them and their heirs for ever, three burgages and four half burgages, for which they pay per annum — 2s. 6d.

“ Sir Richard Buller, Knt. holdeth (ut supra) three burgages and three half burgages, for which he payeth per annum — 2s. 3d.”

The Survey, in the same manner, enumerates all the other burgages, amounting to 165, making together the sum of 3l. in high rents.

The earliest return extant, and which is supposed to be their first, of members to parliament, in A. D. 1552, 6 Edw. VI. the style of which is, “ Major & communitas.”

The next, of may 1, 1553, “ Major & burgenses.” To both the common seal is affixed.

The following entries were read from an old corporation book, indorsed in a modern hand

“ Antient

“ Antient Constitution book, N^o III.” beginning with the fourth year of Queen Elizabeth. It is the only record of this town now extant of an earlier date than 1742; all the other books having been lost or destroyed in a manner not accounted for; in consequence (it was supposed) of the modern dissensions in the borough, viz.

“ The borough town of Saltashe

“ Auncyent & laudable Actes constitutions & ordinances time out off mynd there made used & approved for the good govm.^t & order of the people inhabitinge wthin the said borough towne Examined tryed & confirm’d at the lawe Courte there holden the Monday next after the Feast of Saint Hilary in the yeare of the reign off o.^r most gratio.^s soveign Lady Elizabeth by the Grace of God Quēn off England France & Ireland Defend.^r of the Faith &c the fourth*—Before John Hearing merch^t then Mayor of the same Borough towne Edmonde Birth Deputy to Thoms Willms Esq.^r hed steward of the same Willm Hutchins Esq.^r John Wells Gentlemⁿ Thomas Fynch mehan^t & John Cofin yeom late mayor of the same Borough town upon the othes of John Lovell &c”——

—“ And yt ys ordeyned that all Forreyn Burgeses shall & ought to be contributaries to all reasonable charge done or to be done for the mayntenance & defence of thy.^r libties & fran-

* A. D. 1562.

chyfes of this Towne & for the repaying & mayntēce of the passage boats & the street of the same Towne as shal be cessed and taxed by the Mayor and his Brethren for the time being; or else they & evre of them utterly to be disfranchised of passage & other lybtyes of the same Towne; and that evrie such freeholder shall yerely at Michaelmas enter his fine for his suyte to the Courtes or ells to pay the comon amercyaments for the same."

"Saltaysh—At a Lawe Court there holden the Monday next after Saint Faythes day to wit the xth day of October & in the 17th yeere * of the reign off o^r most gracious soveign Ladie Eliz. the Queens Ma^{tie} that nowe ys It was then & at that time by the othes of Richard Rawe (*and others to the number of 24*) ordered & ynacted as follows —"

"Also yt ys inacted that no pson or psons shall enjoy any of the libtyes of the Towne Except he have lande or tenem^t wthin this Towne in fee to him & hys Heyers for ev.^r And that they and evre of them beare yerely off heigh rent to this Towne 3^d at the least & also to paye unto the Towne all such customes swytes & servise as to the same app'teyneth And alwayes to paye toward the newe making of the passage bote as of old time hath ben accustomed to

* A. D. 1575,

be paid or ells not to be passage free; & to pay for a releefe o. 2. 6^d wheth' yt be a wholle burgage or half a burgage; & to serve at three Lawe Courts there by the yere; & to doe his fealty at the next Court next after he is fownde tennte & to pay for his fealty o.,viii^d wheroff to the Steward iiii^d and to the Comon Box iiii^d”

“ The eighth of November 1675 John Hoskin one of the Aldermen of this Borough did then in open Court declare that he had aliened his Land unto his Sonne, and thereupon desired to be dismissed of his Place of Aldermanship; which was then consented unto by the then Mayor & Aldermen there present, & was discharged accordingly.”

“ The 22^d day of November 1675 Peter Harris one of the Aldermen of this Borough did then in open Court desire to be dismissed of his Aldermanship, wh: was then consented by the then Mayor for that the Land by which he was made burgefs was only a Trust

“ 12 June 1676 Peter Teage then entered his deed & was sworn &c”—Peter Moulton juratus liber burgenfis &c

“ 27^o die Januarii 1678 Tho^s Luskey his Deed of Feoffm.^t entered &c et tunc juratus fuit liber burgenfis burgi prædicti

“ 4^o die Augusti 1679 John Preston Owen Teage & Robert Martin Jun.^r their severall Deeds

Deeds of feoffm.^t were entered & they admitted & sworn freeburgesses of the Borough afores^d.

“ 1st September, 1679 (*The same of Henry Lobb*)

“ 5.th July 1680 Ed'rus Leane calcearius fecit fidelitatem pro terris quas tenet de majore hujus burgi et tunc apud Guildhall' burgi prædicti juratus fuit liber burgenfis Burgi prædicti et præstitit omnia alia juramenta provisa per Statutum hujusmodi casu

“ 12.th July 1680 Ed'rus Leane yeoman &c
(*as in the preceding entry*)

“ Memorandum quod sexto die septembris anno Dñi 1680 in plenâ Curiâ apud Gildhaldam burgi prædicti Andreas Willoughby Antonius Preston Ric'us Hill Ric'us Dingle et quilibet eorum fecerunt fidelitatem pro terris quos tenuerunt de majore hujus burgi et jurati fuerunt liberi burgenfes burgi p'dicti; et tunc et ibidem p'dicti Andreas Willoughby et Antonius Preston electi et jurati fuerunt Aldermanni burgi p'dicti & prestiterunt respectivé omnia alia juramenta et subscriptiones per Statutum provisa in hujusmodi casu

“ The 13 day of October 1690 Benedict Cruft entered his Deed of feofment of the lands lately by him purchafed from S^r Ja^s Tille lying
&

& being adjoining to the street at the foote of the Towne

“ 23^d May 1698 John Ambrose entered his Deed of feofm.^t for the land lately bought of Joseph Williams & did his fealty

“ 23 May 1698 Francis Pollard entered his deed for land bought of Mr. Cook in the back lane, & hath done his fealty

“ 6th day of July 1698 Larance Brent entered his deed of feofment for Land purchased of John Cook

“ At a Court held for said Borough, 22^d April 1706 Richard Gawde of the said borough Shipwright entered his deed of feofment, & was pursuant to the same sworn a freeburgess of the said Borough

“ At a Court held for said borough 16 January 1709 Stephen Williams of the said borough Glazier entered his conveyance deed of his purchase of one messuage or tenement & garden in Saltash afores.^d lately purchased by the said Stephen Williams of Tho^t Luce Gent. of Hitter in the parish of Saint Stephens

“ At a Court for said Borough 28 July 1712 before John Ford Gent. Mayor, Edward Lean Justice & others there present Memorandum That Nath.^l Sweetnam entered his deeds of lease & release of one messuage or dwelling house

house & garden lying in Saltash which he lately purchafed of Robert Beete Gent. & thereon did his fealty

“ At a Court 15 June 1713 (the like entry of John Hicks Gent. for a messuage &c purchafed of Philip Eare Gent.)

“ At a Court 6.th September 1714 (the like entry of John Tucker Esq.^r of a messuage &c bought of Sarah Eare Widow)

“ At a Court 10 Jan.^y 1714. (the like entry of Edw.^d Leane Jun.^r for lands belonging to his Father) & he then was admitted & sworn one of the free burgesfes of the said borough

“ At the same Court Jeffery Connell & John Johnson (are in like manner by entring their deeds admitted & sworn free burgesfes of the said bor.^h)

“ At the same Court Will.^m Porter of this borough (was sworn & admitted a free burgesf of this borough)

“ At a Court 10 October 1715 John Wynnell Gent. entred his deeds (&c) and was then sworn a free burgesf of the borough & did his fealty.”

At the same Court the like entry of Benjamin Wadge

“ At a Court 13 December 1715 Richard Herring of the said borough was then sworn

one of the freemen of this borough for his lands within the said borough & then did his fealty.

“ At a Court 27 January 1717 Tho^r Hurrell Clerk entered his deeds of lease & release of one new erected dwelling house together with a garden thereunto belonging, theretofore a brew-house in Saltash late in the possiōn of Tho.^r Luskey, & then was admitted & sworn one of the freeburgesses of the said borough.”

At the same Court the like entry of Tho^r Dennis

“ At a Court 2.^d September 1723 John Hill was sworn & admitted one of the free burgesses of the said borough & did his fealty.

“ At the same Court Tho^r Leane was admitted & sworn a free burgess of the said borough and did his fealty.

“ Memorandum That on the second day of January 1723 Edw.^d Hughes * Esq.^r was elected & chosen a free burgess of the said borough & was sworn & did his fealty.”

On the day following there are four entries of the admission of Edgcomb Pethen and three others, in the same terms as the last; which, after this period, became the usual form of admission.

* The name of the member chosen in 1722.

It is necessary to state in this place, (though the subject was part of the evidence produced by the sitting members) that the charter of Queen Elizabeth was surrendered by the corporation to King Charles II. in January 1682-3; who thereupon granted another to them, dated 27 Nov. 1683, which intirely changed their institution. The corporation created by this charter consisted of a mayor and six aldermen, and an indefinite number of freeburgesses; of whom 33 are therein appointed. The mayor and aldermen are hereby impowered to elect such and so many as they please, to be freeburgesses: The mayor of the preceding year is to be justice of the peace for the next. The burgage rents above-mentioned, are granted to the corporation, upon paying to the crown a quit rent of 18l. a year. There is also a clause like that in the charter of Elizabeth (A), respecting the election of members of parliament.

The counsel for the petitioners stated, that this charter, as far as it regulates elections of members of parliament, was never accepted or followed in practice. For which purpose they produced the following evidence, to shew that none but freeholders of the borough made the elections *after* that charter; and herein acted without regard to it: Proving also, that those members of the corporation appointed by Charles II.

whose names are signed to the returns, after the charter, were possessed of freeholds in the borough *before* it; viz.

The return of March 1689-90, signed by the mayor and seven others. Three of these are named in the charter, and they were shewn to have had borough lands previous to it*. Of the other five, nothing is to be found in any of the borough records.

The return of October 1691 signed by 21 names. Six† are in the charter, and were freeholders before it: Of the other 15 nothing appears.

To the return of November 1692, 16 names. Six in the charter qualified as above. Five of these are in the former return. Of the other 10 nothing appears.

The returns following were traced through in the same manner:—of October 1695, signed by 21, of whom seven‡, in the charter.—March 1697-8, by 18, of whom five in the charter.—August 1698, by 17, of whom four in the charter.—January 1698-9, by 23, of whom six § in the charter.—February 1701-2, by 24, of whom

* On the next trial in 1787, *four* of the eight appeared to have been in this situation.

† *Eight* in 1787.

‡ *Eight* in 1787.

§ *Seven* in 1787.

seven in the charter *.—The names to these returns are mostly the same.—Those named in the charter, were proved by entries in the constitution book, to have been freeholders previous to it, and sworn freeburgesses; and nothing can be found respecting the rest.

The form of all the above returns is the same; by “the mayor and burgeses” and under the common seal.

The returns of 1714 and 1718 are different; being in the words following, viz. “in cujus, &c. Major & liberi burgeses commune sigillum burgi prædicti apposuerunt; *nec non liberi tenentes per tenuram burgi separalia sigilla sua apposuerunt* †.

To

* In 1787, this further evidence—Returns of March 1701-2, by 20, of whom, seven in the charter;—December 1701, in which eight of the charter—in 1702, by 26, of whom eight in the charter—1705, by 14, of whom five in the charter—1708, by 24, of whom seven in the charter—another in the same year, by 27, of whom seven in the charter—October 1710, by 21, of whom five in the charter—December 1710, by 18, of whom four in the charter—September 1713, by 15, of whom three in the charter, proved as above.

† A petition was presented against the election in 1714, by Trevor Hill and Martin Bladen, Esqrs. the unsuccessful candidates (see 18 Journ. 27). It does not state any right of election, but complains of irregularities and partialities shewn by the mayor and recorder in procuring votes for Mr. Shippén and Mr. Calmady, the sitting members. This petition was not heard in the first session of this parliament, though it lasted from 17th of March, 1714-15, to 26th of

To both these returns there are 28 names, including the mayor's; and a seal to each, besides the common seal. The names are almost all the same in both. Among them is *William Bastard*, who was named in the charter of Charles II. and signed the return in 1701-2, in which his name first appears. By entries in the constitution book it appeared, that two of those who signed the return in 1714, were not admitted into the corporation till long after; one in 1717, and the other in 1723. And one who signed that in 1718, was admitted into the corporation in 1723.

The return of April, 1722, is signed by 36 persons: Of these, the petitioners endeavoured to shew that 31 were freeholders. Eleven were proved so either by entries in the constitution book, or by their having signed the return of 1714, or 1718; and as to 20, a witness of the name of Reed, aged 75 years, who had

June, 1715. In the next session it was renewed, (18 Journ. 494) but with some alterations. In the renewed petition, the recorder's name (who was then dead) is not mentioned; and a new charge is added of *bribery, and illegal practices*, against the sitting members. Nothing further appears in the Journal relating to this petition. The alteration in the charges of this second petition was contrary to the rules and practice of the House, which require that a renewed petition should be the same in substance as the original.

known

known them all, gave some account to that effect: But he failed as to several, in ascertaining the *time* of their possessing freeholds to have been prior to 1722, at which time he was only 12 years old. With respect to the other five, no account was given. Reed knew several of the 20 not to have been members of the corporation, or (as he called them) *sworn freemen*.

The return of February, 1722-23, is signed by 35 persons, all of whom except one or two, the petitioners endeavoured to prove, by the same means as in the last, to have had tenements in the borough. The two last mentioned returns have the form following: "Major & liberi burgenfes commune figillum & figilla fua appofuerunt." About this time the change took place in the form of entering the admissions into the corporation, before mentioned in p. 130.

The return of August, 1727, is signed by 14 persons who had signed former returns, and were accounted for as having borough lands.

The return of February, 1733-34, is signed by 32 persons, all of whom were accounted for as having lands in the same manner as before, except fix.

The return of May, 1734, is signed by 32; of these, 11 were not accounted for.

All the above returns were under the common seal, and by "the Mayor and freeburgesses." As far as Reed's testimony applied to the three last returns, he was more certain. In the two last returns he was confirmed by a witness of the name of Dunn, aged 62 years. Reed left the town in 1734.

The return of May, 1741, is signed by 49 persons, of whom 32 were accounted for as before. There was no contest at this election; and Dunn said, some signed it who were neither freeholders nor sworn freemen: In this he was confirmed by another witness. Some of those whom he knew to have been freeholders were not sworn freemen.

The return of April, 1743, is signed by 38, of whom 35 were accounted for as before. This return was under the same circumstances as the last. Mr. Cleveland, one of the members then chosen, who was also chosen in 1741, bought a freehold tenement in the borough, in order to be sworn a freeman.

The return of July, 1747, is signed by 45, of whom 30 were accounted for as in the former instances. That of May, 1751, is signed by 37: At the head of whom, after the mayor's name, is that of *John Harrison, inhabitant and freeholder*; near it is *Benjamin Young, ditto*. The other

other names have no addition. Harrison's name appears in two or three returns preceding.

The circumstances of this return were thus related by two gentlemen (Mr. Gaborian and Mr. Lyne) who were present. There was no contest in this election; and while the return was preparing, Harrison, who was a gentleman of fortune in the town, desired to sign it. Mr. Trevanion and Mr. Hickes, two aldermen who were leading men and conducted the election, told him there was no occasion for more signatures, and withheld the return from him. Upon this, Harrison became more earnest; said he was a freeholder, and had a right to sign; and asked the other very positively, whether he chose to refuse him. Trevanion then threw the return over the table to him, and he and Hickes bade the town serjeant call in any body else to sign it. Harrison said, that would not invalidate his signing, and then wrote his name as above; after which Young signed, and then several others. Harrison was not of the corporation. Gaborian knew four others, who then signed, to be freeholders, and not of the corporation; and four whom he believed to be neither *. Lyne named another, one *Evelyn* †, who was called upon to

* One of these was *Peter Jagoe*, the town-serjeant, whose name is also signed to the return of July, 1747.

† His name is not on the indenture.

sign it. They had never known any person besides Harrison demand to sign a return as a freeholder.

There was no contested election from the year 1723 till 1772. In or about the year 1773, the corporation became nearly dissolved in consequence of disputes among themselves, by which a great number of freemen, illegally elected, had been disfranchised. The remaining members applied to the crown for a new charter, which was granted by his present majesty, in June 1774. The terms of it are, in general, like those in the charter of Charles II. and the clause relating to the election of members of parliament, is repeated in it.

Nine witnesses were examined to prove the general reputation of the borough as to the right of voting, viz. John Reed and James Dunn before mentioned, Jane Reanes aged 81, Mr. James Gaborian a lieutenant in the navy aged 54, John Thompson aged 65, Rev. J. Lyne, Nicholas Hoare aged 59, Joan Dunn aged 54, and Mr. Cleveland the present member for Barnstaple. The examinations of two witnesses upon the trial before the last Committee, who had died since, were likewise read from the clerk's minutes of their proceedings. These were the Rev. Joshua Howell then aged 84, and John Darton.

The

The accounts given by these witnesses were somewhat different.

Reed lived in Saltash till 1734, at which time he was 24 years old; was absent from it from thence to 1749, since which time he has regularly lived there. He had always understood, that the right of voting for members of parliament belonged only to such as possessed *a house of land* in the borough; which he explained to mean, land on which a house stands, or had antiently stood. He had formerly known persons, whom he named, buy such property for the sake of a vote. He had received this notion of the right from old persons, long since dead; some of whom were freeholders, and others not so: Had heard of *faggots* in the borough, (persons with sham votes, who had only colourable title deeds given to them) and named three such who voted at the election (which he called the Duke of Wharton's) in 1723*; he believed them to be so by their having passed for such at the time.

In his examination before the last Committee, he said nothing of what he had heard from old persons respecting the right: On being now asked why he did not, he said he was not questioned about it. He did not know whether this right

* Mr. Lloyd was then elected on the Duke's interest.

had been always put in practice or not. Said there had been no sworn freemen formerly who had not a house of land; and that none could be admitted without it; but freeholders could not be made aldermen without being first sworn freemen. Two of his relations had possessed such lands in fee, but were not sworn freemen. He had heard of *burgages* in Saltash, but not before the present disputes began; and did not know the meaning of the word.

Dunn had heard his father and grandfather say, that those who had *free land in the borough*, had the right. Both of them had lands in the borough, and were not sworn freemen. His father, and father-in-law (who was also a freeholder) had signed returns. The witness understood the right to be in those who had free land.

Jane Reanes, had lived in Saltash since she was ten years old; she understood the right to be in *freeholders, if they lived in houses of their own, and in sworn freemen also*—described a freeholder to be one who had *a house of land*; had heard such persons called by the name of *freeholders*, and by no other;—distinguished the two classes by the names of freeholders and sworn freemen; the word *freeburgess* was not familiar to her—had always heard that freeholders had the right; and in her younger days they had always voted for members.

Mr.

Mr. *Gaborian* said, he was a member of the corporation under the new Charter, in which he had been appointed such; and had also been a member of the old corporation from the year 1751. He had likewise a freehold in the borough, descended to him from his father. He said, it had been the common repute of the town, that *freeholders and members of the corporation*, ought to choose the members of parliament. His father, and Mr. Joseph Swetnam, who were both freeholders and corporators, and the latter an alderman, had told him so; and he believed that to be the right. He distinguished the two classes by the names of *freeburgesses* and *sworn freeburgesses*. — — Said, that a freeburgess was one who had a house of land, i. e. a house of old standing, or land where one had stood formerly; and a sworn freeburgess was such person admitted of the corporation;—that freeburgesses (whom the other witnesses called freeholders) could only vote for members, and not for mayor or aldermen.

Swetnam, formerly an alderman, had told him, that it was necessary to have a house, in order to become a sworn free burgess, and that he had been obliged to buy one of the witness's father for that purpose. *Gaborian's* father had also bought a house, in order to give it to the witness's brother, to make him a vote. In 1753,
after

after the death of Trevanion, there were 12 sworn freeburgesses made at once. Previous to their election, Trehearne, one of the 12, applied to Gaborian's mother, to make him over a title to a house for the purpose; which she complied with. But the day before he was to be admitted, one of the aldermen bade the witness tell Trehearne, not to bring his deeds to the hall, "for they could not raise deeds enough for 'em all, and should drive through without them as well as they could."—Trehearne married the witness's sister.

To shew that it was necessary, that the qualification should be derived from an *old* house, or its site, he related the following circumstance of Edgcombe Pethen, whose name has been before mentioned, in p. 130. This man, in order to be sworn a freeman, produced the title deeds of a meadow conveyed to him by the witness's father; but when the mayor and aldermen had examined them, they told him he could not be sworn in on those deeds, because they did not prove that there had been a house on the land; and he was not then sworn. He afterwards got a *house of land*, and was sworn.

This witness had endeavoured to be chosen an alderman of Saltash in 1783, and had been disappointed in his application for it. He had not been examined before the former Committees.

John

John Thompson was born and had served his time in Saltash, and lived there till he was 25 years old. Had been told by old people of the town, long since dead, that *freeholders of a house of land* had a right to vote *as well as sworn freemen*. That old ruins, where a house had stood, would do as well as a house: That they must live upon *their own*, for a lease would not do. An old man of the name of John Wills, had told him so 50 years ago. Wills was then 70 years old, had always lived in the town, and was neither freeholder nor sworn freeman. Wills often told him he had seen freeholders vote at elections. The witness had never heard otherwise of the right till of late years. He had been examined before the last Committee, but said nothing then of what he had heard from Wills. He now gave as a reason for it, that he had not been then questioned upon the subject. That nobody had been present at the times when he had the conversations with Wills. He had not mentioned his opinion of the freeholders' right before 1780; and said it was because it had never come into his discourse before. He never knew a contested election; and had never been in the hall at election time. Had never heard the word *freeburgess* applied to freeholders: Had formerly heard say, it was necessary to carry deeds into court to be sworn a freeman.

Mr.

Mr. *Lyne* was a member of the corporation, and appointed such in the last charter: Had also belonged to the old corporation under the charter of Charles II. He had known the borough 39 years, having resided there from 1746 to 1754, but not since. Was made a corporator two or three years after he came there, at which time it was thought necessary to have the previous qualification of a freehold. About ten others were made at the same time with him; all of whom, as well as himself, produced conveyances of freehold lands to the court when they were sworn in. The mayor and aldermen told him it was necessary. The witness's conveyance was given him for the purpose, and only colourable.

Many respectable people, now dead, (two of whom he named) had told him that *freeholders*, or *freeburgesses*, had the right of voting; and it had been the general report of the town. By *freeburgesses*, he meant freeholders of the burgage tenures, described in the charter of Cha. II. He and his acquaintance used to call them so. Members of the corporation were called *sworn freeburgesses*. At the time of his election they acted under the charter of Charles II.

The witness had never known a freeholder vote *as such*, or claim to vote, or say he had voted or been canvassed.

There

There had been no contest in his time till 1772. In that election he himself voted as a sworn freeburgess: He had also voted in all the elections while he resided in Saltash. Many inhabitants used to be in the hall; for none were refused admission upon those occasions.

He had heard freeholders frequently complain of the usurpation of their antient right.

Nicholas Hoare had known the town from a boy, and had always heard that *freeholders* had the right; that *sworn freeburgesses* might vote for members, and for mayor and aldermen both. He had never been present at an election; had never known freeholders described by any other name than that of *freeholders*; neither as freeburgesses, nor as burgage tenants: Had never heard of the latter phrase in Saltash till the trial in 1780. The two classes were, *freeholders* and *sworn freeburgesses*. Had never heard a freeholder say he had voted; but remembered several being canvassed by Mr. Cleveland in 1741, and his own father in particular.

He went with his father to the court in 1742, or 1743, when the father was to be made a sworn freeburgess. Hickes, who was then mayor or acting alderman, asked him for the deeds of his land, and told him he must produce them before he could be sworn; the witness was hereupon ordered by his father to go home for

them, and went and returned with them to the court. Upon their being shewn at the table before the aldermen, his father was then sworn in.

Joan Dunn had frequently heard it said, that the *freeholders* had a right to vote *as well as the sworn freemen*, (persons who had a house, or the ruins of a house); but not if there had been no house on the land. Her father was a freeholder. She had heard of *faggots* formerly, (persons who had other people's deeds to vote on); and if a man produced another's deeds, he would be called a faggot, whether it were to vote or be sworn. Had never heard of *burgage tenants* till lately. Had heard freeholders generally called *freemen*; never *freeburgesses*; and the others *sworn freemen*. That it was necessary to produce deeds in court in order to be a freeman.

Mr. Cleveland said he was now an alderman of *Saltsb*, appointed in the new charter, and had been a freeman under the old one. His father was member for the borough in 1741, and had the entire management of it till his death in 1763; though not member for it in the latter part of his life. He had a perfect knowledge of its constitution; and had often told him (the witness) that "freeholders had a right of voting; and that if it were ever tried, he had no doubt that they would recover their right: That they had a *concurrent right* with the corporation: That, however,

however, it was not likely to be tried in his time, on account of the friendship subsisting between him and Mr. Buller." He had purchased a freehold in the borough of old Mr. Hickes, in order to leave it to his son, (the witness) that he might be possessed of both rights. His father's aunt had, at his request, desired Mr. Buller not to oppose him in his first election. Many of the freeholds belonged to the members of the corporation, and a considerable number to Mr. Buller. He did not know where the majority lay; they were in a great many hands. Hickes had formerly possessed several. He had never, to his knowledge, paid any burgage rent for his own (which he had sold) while it was in his possession; at least, never under that name. By *freeholder* he did not understand a burgage tenant.

His father had never told him the reason upon which he founded his opinion; nor did the witness know by what means in particular he had acquired his knowledge of the borough: Had never mentioned to him that he canvassed freeholders in 1741; nor that it was necessary to have a freehold in order to become a corporator. Nor did he himself know that any pains had been taken to suppress the claim of the freeholders, except in the instance of the application to Mr. Buller respecting his father. He

had never seen any corporation books more ancient than the year 1752.

Mr. Cleveland said, he entertained no doubt himself of the right of the freeholders, and had often said so before the year 1780: Had heard others in the borough, now deceased, besides his father, say the same. He never heard complaints among them of their not being permitted to vote. There had been no poll in his time.

There were only nine freemen of the old corporation left at the time of their obtaining the new charter.

Mr. *Howell's* evidence before the last Committee, as stated in the minutes, was to this effect:

He had been presented with a living within three miles of Saltash, by Mr. Buller (grandfather of the present) in 1725. In 1726, the witness had frequent conversations with N. Swetnam, an alderman of Saltash. Had often heard him speak of the right of election in the borough. Swetnam stated it to be *in all the freeholders, or burgage tenants, whether they were sworn for corporation acts or not, and in no other.* The witness was intimately acquainted with the borough after 1732; and had heard many others, some who were aldermen, (*Herring and Mayo*) speak of it in the same manner.

Swetnam

Swetnam did not say who had the right to be sworn of the corporation; but the witness apprehended it was matter of favour in the aldermen, though none were admitted without having a burgage freehold. Had heard from Swetnam, and from Herring who had several houses in the town, that whole burgages paid 6d. and half burgages 3d. to the town receiver. They said they themselves had paid it; and spoke of it as a common thing.

Here he produced a paper in the hand writing of one Lyne, who had been steward to the Buller family, which had been then lately found in the record room at Morval, (Mr. Buller's house) containing Lyne's bill of charges in his stewardship, to Sir Walter Moyle Mr. Buller's trustee, in 1697. It contained the following *Item*:

“ October—Paid three years rent and fees to the
audit, for the burgages in Saltash and
Trematon — £.3 16 6”

This Mr. Buller died in 1710; Lyne in 1740.

Mr. Howell never heard of any other right of election than that abovementioned; till about 40 years ago, Trevanion (whom he well knew) introduced the mode of confining it to the sworn freemen.

John Darton's evidence on the minutes was to the effect following. He was examined before the last Committee, chiefly to give an account

of the election in 1741, hereafter mentioned; but he said likewise, that it had been always thought necessary for a man *to have a house* before he could be a sworn freeman; but about 30 or 40 years ago, they began to swear freemen who had no houses; it was then generally said they had no right to do so.

There were particular circumstances related by the witnesses of the elections in 1722, 1741, 1751, and 1772, which I have reserved for this place, that the reader may view the whole together.

Reed and Jane Reanes remembered the election in 1722. Swanton and Hughes, and Buller and Carew, made the two parties. The two first were returned. Reanes (then 18 years old) said she was in the hall at that election, and that the freeholders voted. There was a great crowd, and she could not actually *see* them vote; but heard the gentlemen ask for their deeds, and they said they had them in their pockets. She did not see them produced, and did not know who it was that called for them: Could not say it was the mayor. She staid above an hour in the hall. Named six freeholders, who were not sworn freemen, whom she saw there at this time. She lived servant with a Mr. Gaborian, (a freeholder, and not then a sworn freeman) who after the polling, gave liquor to some freeholders.
who

who voted for Swanton and Hughes. A Mrs. Eares had made five or six faggots at that election. The mayor, Edward Leane, was a friend to Swanton and Hughes. This witness had not been examined before the former Committees. Being asked if she had heard of the present disputes, or had mentioned the above circumstances to any one, said she had heard that Mr. Buller had opposed the corporation four or five years past; but had not related what she knew of the above election till about a year and a half ago, to Captain Gaborian (brother to the witness in this cause). Being asked how this happened, said she had not been talked to about it.

Reed had a brother and brother-in-law, who were freeholders and not sworn freemen, that voted in this election. He named two persons, who, he said, bought lands then, in order to have votes. Was not present in the hall. His reason for saying his two relations *voted*, was, that he and they lived all in one family at that time, and he saw them go out to the hall to vote; and when they returned, they said they had voted. The persons who, he said, bought freeholds for the sake of voting, lived afterwards in the houses they had purchased; he only knew by hearsay that they got them for election purposes.

Howell's evidence referred to on this subject was, that Mr. Buller was only tenant for life of his estate, and so could make no faggots in this election (B). When he was asked, if the freeholders had not been rejected, he said he had never dreamt of such a thing.

In the election in 1741, Cleveland and Corbett were chosen without any opposition; But the former had at first expected it; and Gaborian said, he then canvassed the freeholders. A short time before this, Gaborian and his father (who was then a freeholder and sworn freeman) called on Mr. Cleveland at Plymouth; when the latter said, he was going to ask the *freeburgesses* * for their votes. His father told him he was right, for they were as good votes as himself; and though he (Mr. Cleveland) might not want them then, he might at another time. Mr. Gaborian afterwards saw Cleveland go about Saltash, in company with some aldermen and Hickes the town clerk, who was an alderman too, canvassing freeburgesses or freeholders.

Hoare said, he and his father (who was then a freeholder, and afterwards of the corporation) went about the town with Cleveland canvassing freeholders, (of whom he named two) who pro-

* See his evidence in p. 141.

mised him their votes if there should be any opposition. The witness's father also promised him his vote, which the other had solicited.

Joan Dunn remembered Cleveland and Hickes canvassing her father, who was a freeholder (and never a sworn freeman). Hickes, she said, introduced her father to him in the words, "here is one of our freemen."

The election of 1751 has been already mentioned*. The present Lord Rodney was then elected without opposition, in the room of Mr. Corbett deceased. Gaborian said, that this was the first time of refusing a freeholder's vote [*which he must have meant of signing the return, as there was no poll*]. That this was Trevanion's scheme. There were then about 12 sworn free-burgeffes, and about 150 freeholders, reckoning all that could be made, and including those in the possession of women or infants. Being asked how it happened that so great a body of persons submitted quietly to this refusal, he said, they did not remain quiet; they were very angry upon the occasion, but nobody would stand forth; without some one to support them, their opposition would have been vain.

This witness knew of nobody's having signed this return who had not land in the town.

The election of 1772 happened upon an accidental vacancy. The candidates were Williams

* In p. 137.

and Bradshaw; the former of whom was returned: But upon a petition to the House by the latter, heard before a select Committee, he lost his seat, which was transferred to the petitioner. It was a contest entirely between two parties of the *corporation*, in which the freeholders did not interfere at all. Williams was a stranger to the place, and supported by Hickes and Mayo, two aldermen*.

Gaborian said, it was a very warm contest. He was engaged in it on Bradshaw's side, and did not then claim to vote as a freeholder. Being asked, Why the freeholders in general did not claim, said, It would have been useless, as nobody supported them. Being asked if they had applied to either of the parties for that pur-

* It appears by the minutes of the select Committee, before whom the merits of this election were heard, that the poll contained nine votes for Williams, and eight for Bradshaw. The petitioner objected to five votes for the sitting member, viz. three as not having been a year qualified as burghesses, according to 3 Geo. III. c. 15, and two as no burghesses at all. The sitting member objected to two votes for the petitioner as no burghesses; and endeavoured to justify the three objected to by the other party, as not within the meaning of the act: Both sides proceeding upon an admission of the right of election in the mayor, aldermen, and burghesses, as described in the charter of Cha. II.

The Committee determined in favour of the petitioner on the second day of their sitting. 33 Journ. 764, 956.

pose,

post, said, he believed not, though some had talked of it, and had expressed a wish to this effect. That it had been said in the town, the reason was, because the late Mr. Buller had been so circumstanced with respect to his estate, that he could not make votes. The candidates had not, as far as he knew, come to any agreement not to poll freeholders. The witnesses then thought, (and said to Sir Fred. Rogers) that if Buller had joined Williams, the latter would have succeeded. The attempt to carry the freeholders was started in 1780. All the corporators in 1772, did not amount to 20.

Mr. Mill, the town clerk, who was also mayor at the last election, was examined in the beginning of the cause, when he produced the poll. The material part of his evidence was as follows:—That he had known the borough particularly about 16 years, and had resided in its neighbourhood about 30; had never heard till the present dispute commenced, of a right in freeholders or burgage tenants; nor the expression *burgage tenure* applied to tenements in Saltash, till within the same period. In the election in 1772, there was no idea of a claim by freeholders.

The counsel for the petitioners went through a long examination of this witness; endeavouring to shew a contradiction in his sentiments,
and

Copy of the Poll

7th 7ber 1713 At the Guildhall of the borough of Saltash in the county of Cornwall
An election for chusing 2 burgeses to serve for the said borough in the ensuing Par-
liament then and there held.

Candidates.

Votes for Jonath. Elford Esq.

Mr John Ford jun^r Mayor
Mr John Ford sen^r
Mr Edw^d Leane
Mr C^r Hill
Mr Matherw Veale
Mr W^m. Roberts
Nicholas Stephens
Mr Rich^d Herring
Mr Peter Mill
Joseph Williams
Owen Teague
Francis Pollard
Mr John Hickes
Nath^l. Sweetnam
Edw^d Leane jun^r

15

Votes for W^m. Shippen Esq.

Mr Jn^o Ford jun^r Mayor
Mr John Ford sen^r
Mr Edw^d Leane.
Mr C^r Hill
Mr Matherw Veale
Mr W^m Roberts
Nich^s Stephens
Mr Rich^d Herring
Mr Peter Mill
Joseph Williams
Owen Teague
Francis Pollard
Mr John Hickes
Nath^l Sweetnam
Edw^d Leane jun^r
Tho^s Luskey
Geo. Lobb
W^m Parnall—q^d
Jn^o Preston
H^y Preston
Benedi^t Crust—q^d
Stephen Williams
Rich^d Garwde
W^m Bastard—q^d
Tho^s Williams—q^d
John Daryes
Joseph Hunkin—q^d

Votes for Martin Bladen.

Tho^s Luskey
Geo. Lobb
W^m Parnall—q^d
John Preston
Henry Preston
Benedi^t Crust—q^d
Stephen Williams
Rich^d Garwde
W^m Bastard—q^d
Tho^s Williams—q^d
John Daryes—q^d
Joseph Hunkin—q^d

12

q. Benjamin Wadge bought Ned
W^{ms} burgage land.

New Voters

{ Mr Lark
{ Rob^t Pyper
{ Mr Porter
{ Benjⁿ. Wadge

There were three candidates at the above election; Elford, Shippen, and Bladen. The two first of whom were returned. The paper in question contains the names of the voters for the several parties written by one Pound, at that time clerk to an ancestor of the present Mr. Buller; who was then Recorder of Saltash, and died in 1714. It was indorsed in the same hand thus, "8 Sept. 13 *A copy of the poll at Saltash.*" The agent for the petitioners found it among other papers, of that Mr. Buller since the last election; and in company with it, a letter dated 12 August 1713, from Mr. John Hickes, one of the corporation, to the recorder, relating to that election; in which he tells him, "Pound could give a full account of the affairs; that Col. Bladen was to stand in the room of Sir John Jennings, who had given up," and adds in a note, "*Some of the deeds are ready, and the rest shall be ready in two days.*"

This writing is copied on the paper hereto annexed. The words "*New voters,*" written opposite the four names in a circumflex at the bottom, and those four names, were in the recorder's hand writing; as was the note respecting Benjamin Wadge. Four of the persons named in this copy of the poll, were admitted members of the corporation afterwards.

The

The following is a state of the evidence produced for the sitting members.

The returns of 26 Eliz. 30 Eliz. 3 Chas. I. (none intervening from 30 Eliz. having been found) 16 Chas. I. 31 Chas. II. being all under the common seal; stating an election by the *mayor and freeburgesses*, and signed by the mayor only.

The return of 29 April 1660, 12 Chas. II. in the same form as the foregoing, but signed also by 17 persons besides the mayor—of 32 Chas. II. signed by six persons—of 33 Chas. II. signed by the mayor only; having an indorsement in these words, “*Sigillatum & deliberatum in præsentiâ horum quorum nomina conscribuntur;*” after which follow six names—of 1 James II. by the mayor only—27 Geo. II. 1754, signed by 16 persons—1756 by 19 persons—1761 by the mayor and 14 others—1763 by the mayor and eight others, and witnessed by three who are not electors—1768 not subscribed—1774 and 1780, by the mayor only. In all of them the form is the same, and all have the common seal affixed.

It was admitted on the part of the petitioners, that all those who have signed the returns since 1754, have been sworn freeburgesses of the corporation.

An entry in the constitution book, dated 22d January 1682-3, being an order for the surrender of the charter of Eliz. to the crown, by the majority of the burgesses; stating it to be done, "to the end nevertheless, that his majesty would reincorporate the said borough, and regrant the premises to such new corporation as his majesty should think meet."

A copy of the act of surrender itself, under the common seal, bearing the same date; on which a memorandum is indorsed, that it was surrendered February 22, by the Earl of Bath and others, whom the burgesses had appointed their attornies for the purpose (I).

The charter of Charles the II^d, as before stated, dated the 27th Nov. 1683. (35 Charles II.) which, after providing that freeburgesses shall be chosen by the mayor aldermen and justice, as often as they shall think fit, has the following clause: "Et quod nullus alius impoſterum habebitur vel reputabitur fore & eſſe liber burgenſis burgi prædicti, niſi liberi burgenſes in his præſentibus præantea expreſſis nominati, & ipſe vel ipſi qui per ſuffragium majoris juſtitarii ad pacem & cæterorum aldermanorum vel majoris partis eorundem, tali modo & formâ ut præfertur electus admiſſus & juratus, vel electi admiſſi & jurati fuerint."

The

The proclamation of James the II^d, for restoring to corporations their charters and privileges, dated 17 Oct. 1688; by which the king restores to their former state all those corporations, whose surrenders had not been entered of record; but excepts those whose surrenders had been so entered: To which last he promises a restitution of their rights by new charters, upon their applying to him for that purpose. Among the latter class is Saltash. No application was ever made by this borough, for the benefit of the restitution offered in the proclamation (K.)

The petition of the members of the corporation to his present majesty, dated 31 May 1773, stating the dissolution of the corporation, and the incapacity of the petitioners to continue it: Signed by six persons.

The charter of his present majesty as before stated, dated 7th June 1774. It has a recital in these words: "Whereas it appears to us, that by several disputes and accidents, the corporation aforesaid is become dissolved and incapable of doing any act to continue itself——"

The poll of the election in 1772, containing no names but those of corporators.

In order to shew further, that the charter of Charles the II^d, was completely accepted and uniformly acted under, a clause was read from
that

that of Elizabeth, which directs the mayor to be elected on the Monday next before Michaelmas; another in which the number of the aldermen is fixed at ten, and no mention made of any *Justice* of the borough among them. With respect to these points, those parts of Charles the II^d's charter were particularly referred to, in which the day appointed for electing the mayor, is the Saturday after St. Matthew; the number of aldermen is limited to six, and a new officer is created to be called the *Justice* *; which office is there directed to be held by the Mayor, in the year after his mayoralty. It was admitted by the petitioners, that since this charter, the mayor has always been elected on the day it prescribes; that the number of aldermen has been six; and that there has always been one of them in the place of Justice: Upon which last article the counsel for the sitting members adverted to several corporation acts, in which the name of a person signing himself *Justice*, appears subscribed next to the Mayor's.

Upon this case the counsel Argument for the
for the petitioners contended, Petitioners.

* The counsel for the petitioners *said*, that a previous charter of Charles the II^d, had created this office; but this charter was not produced in evidence.

That Saltash was a borough consisting of bur-
gage tenures: That the right of election had
originally been exercised by none but the free-
holders of such tenements, consisting of houses
or the scites of houses, and still belonged to
them alone. They argued in the following
manner:

In order to discover what the constitution of
this borough was, at the period of its first send-
ing representatives to parliament, in the reign
of Edward VI. we must inquire into its more
antient state. According to the earliest evi-
dence, the burgage tenants possessed the only
privilege, that could belong to the borough.
The charter of Valle tortâ, was a feudal grant
to those only, who held the tenements for which
a rent was paid to him as lord, and were the
liberi burgenſes on whom he confirms the privi-
leges therein enumerated. It is immaterial to
inquire, whether this was an original charter of
incorporation; or whether the borough is now
to be considered as possessing that privilege
earlier, and deriving it from prescription. In
either case, it was in right of *land* that the bur-
gesſes enjoyed their franchises, whether as indi-
viduals, or as members of a community.

In this charter *freeburgesses* are described as
then existing, and every clause relating to them,
is applicable only to their tenure; their *rent*,
and

and *relief* upon descent, their election of port-reve or bailiff, (who was the lord's receiver) their *talliage for knighthood, common of pasture, &c.* shew that they were the tenants of his feignory, to whom he remitted the arbitrary services of villenage, and secured their lands, upon receiving in lieu of those services a rent certain.

It is therefore clear, that they could not receive this grant in any corporate capacity; but merely in right of individual tenure, which was that of burgage; according as it is described in Litt. sect. 162 *. They held their tenements as individuals, though for the general regulation of the town, they met together in a body to elect their *prepositus*; and possessed some rights of community.

This was the state of the borough; when it came into the hands of the crown in right of the dutchy of Cornwall †. The charter of Richard II. made no alteration whatever in that of Valletortâ, but simply recited and confirmed it; just so did the subsequent charters of Edward IV. and Henry VIII. Thus it existed according to its original constitution, when first represented in parliament, which happened long before the charter of Elizabeth; except that the mesne holding had been extinguished, by the accession

* See vol. i. p. 180.

† See 2 Willis, Not. Parl.

of the honour of Trematon to the crown, and the borough then held *in capite*.

There can be no question who were the free burgesses of Saltash, or what was the state of their borough, during all the time intervening, from the reign of king John, to the reign of king Edward VI. They were the holders of lands, to whom and *their heirs* Valle tortâ granted his charter, i. e. *the freeholders of the borough*, in the modern acceptation of it. For the *name* is in itself indifferent; the substantial quality continued as before. The town was a tenure in burgage, according to the definition which Blackstone gives of it (2 Comment. p. 82.) "Where houses, or lands which were formerly the sites of houses, in an antient borough, are held of some lord in common socage, by a certain established rent."—The right itself cannot be affected by the name given to it; and it signifies little to inquire, by what name it has been called by its inhabitants.

Without resorting to experience, and to the evidence of actual usage, which the case furnishes, if we inquire who elected the first representatives for Saltash, upon the foundation of Valle tortâ's charter and those which confirmed it; and upon the principles of the antient constitution of England, or feudal representation, we must be convinced that they were the burgage
tenants

tenants that inherited the lands described in the antient charter, and were called the freeburgesses. The only two returns extant of elections prior to the charter of Elizabeth, are quite consistent with this mode of election. The word *community* describes those persons collectively who elected; it is used in the same sense, in the election writ, to describe the freeholders of a county *: Just so, the phrase *Mayor and burgesses* is to be understood, according to the usage and constitution of the place it is applied to.

The right of voting by tenure is, according to lord Holt's doctrine in the case of Ashby and White, a *real* right annexed to the burgage land: It derives nothing from a corporate quality. That learned judge distinguishes the rights of election into *two* classes only: First, where the election is made in right of tenure; and, Secondly, where it is derived from the rights

* In Madox's Hist. Exch. p. 153, 177, 178, in the notes, are passages in which the phrase *communia* and *communitas judæorum*, is currently used in antient records, to describe the Jews residing in England, paying talliage to the king. "*Communia totius terræ*," is a phrase in the articles for Magna Charta. The title of the stat. 8 Hen. VI. ch. 27. is, to give remedy to the inhabitants of Tewkesbury, against the commonalty of the forest of Dean, for robberies committed by them. In the body of the act are the expressions "*commonalty of the hundred and forest*;" and, "*although the said commonalty be not a commonalty corporate.*"

of a corporation *; but a *mixed* right, partly territorial, and partly personal or corporate, he does not even suppose capable of existing, according to our original constitution.

The first change these burgessees underwent, was by the charter of Elizabeth; which it is necessary to examine attentively. It may be called the first effectual incorporation of the borough; was granted upon the petition of the *freeburgesses*, was addressed to *them*, created *them* a new body corporate, and was intended solely for *their* benefit. It is remarkable, that though the method of electing their mayor and aldermen, is particularly marked out, the charter provides none for the electing of *burgesses*. This is a very singular omission, and furnishes a strong argument for the petitioners; for it demonstrates, that those persons derived their existence from something *intrinsic*, without requiring the aid of a creation under the charter. Whether, notwithstanding this silence of the charter, it did not impliedly convey a power to the corporation, to make whom they pleased burgessees; or whether it did not refer to some known constitution of the borough on this subject, are questions of no moment in the cause; for in fact there never was a common burgessees

* 2 Lord Raym. 951.

election under that charter. But every burgage tenant in the borough, by producing the title deeds of his tenement, was *admitted* a member of the corporation. He was then called a *sworn* freeburgess, in contradistinction to those who were not so admitted; which distinction still exists in the memory of the witnesses. This method of continuing the corporation, shews a consistency with the ordinance * passed in the year 1575, by which the possession of land is made necessary to the enjoyment of the town privileges.

The charter recites and confirms that of Valle tortâ, and establishes all the privileges derived from it; therefore whatever right of election to parliament had existed before, the same is ratified by the Queen's charter. Although the borough had sent members to former parliaments, yet the charter has a clause, containing a grant of this privilege: Admitting (for argument's sake) the effect of this clause, the mode of electing the members was not thereby altered; for it is given to the *mayor and freeburgesses*, who, as the petitioners contend, elected them before. If these persons were of a different description from the burgage tenants, who derived their rights from Valle tortâ's charter, and not by any corporate election, it is incumbent on the sit-

* See p. 125.

ting members to shew, from what authority they derived their existence. If the charter had directed, who in particular should choose the members; as for instance, if it had given the choice to the mayor and aldermen, it would have been void in this respect. This is the doctrine of Coke, Holt, Glanville, and every other great lawyer. The words of the former in his 4 Inst. p. 48, declare this doctrine fully: “ *If the king doth newly incorporate an antient borough (which sent burgesses to the parliament) and granteth that certain select burgesses shall make elections of the burgesses of parliament, where all the burgesses elected before, this charter taketh not away the election of the other burgesses. And so if a city, &c. hath power to make ordinances, they cannot make an ordinance, that a lesser number shall elect burgesses for the parliament, than made the election before. For free elections of members of the high court of parliament, are pro bono publico; and not to be compared to other cases of elections of Mayor, Bailiffs, &c. of Corporations.*”

But neither did the Queen intend to alter or qualify this part of their constitution, nor could her charter have been effectual, if she had intended it. The preamble, as well as the particular clauses of grant, shew, that the chief object of the charter was the commercial benefit of the town; and the fact of its having sent mem-

members to parliament from the reign of Edw. VI. shews also, that the charter could have had no particular view to its parliamentary state. And it is addressed to those who derived their rights from the former charters, which were the bur-gage tenants.

This absurdity would also follow, from supposing, that the charter of Elizabeth had abolished any such right belonging to the freebur-geffes, viz. *They* applied for the charter; but it must be argued, that they desired to have their own privileges destroyed, if the charter were to receive such a construction.

Ten years before this charter, the freebur-geffes appear to have been jealous of the en-croachments of the other inhabitants, upon their burgage rights; and to prevent them, they enact a byelaw of qualification, securing the holders of land in the sole possession of their privileges. This shews them to have been attentive to their interests in right of tenure, and that they had a just notion of their situation under their original charter. Although the expression *land in fee*, in this ordinance, may seem to contradict the claim of mere freeholders, yet, duly considered, it does not affect the case; because upon legal principles, a *freehold* was always a sufficient estate to give the right of election; and besides, it is no more than a re-
gulation

gulation of the internal œconomy of the town. But were it otherwise, no byelaw can change the right of electing representatives; the reason of which is given, together with the rule itself, by Glanville, p. 17 of his Reports, "because the commonwealth is interested in the freedom and consequence of such elections."

The charter of Elizabeth further grants to the corporation in fee farm, the burgage rents first payable under the charter of Valle tortâ, and afterwards to the duchy of Cornwall. Thus, after this charter, the burgage tenures, and the freeburgesses of Saltash, retained not only the effect, but all the appearances of their antient institution. The survey in 1650, proves it to have continued till that time in the same state. All the entries of the corporation book of *entering deeds* and *doing fealty*, prove the same. These forms continue without variation, till the charter of Charles II: And though the design of that charter is apparent, to garble the corporation in this respect; yet after it (so deeply was it ingrafted in their constitution) the same form of entry was observed upon the admissions of burgeses; which still preserved the evidence of a right by tenure. It is remarkable, that the form is of an *admission*, as of course and of right, to be a freeburgess, upon shewing the deeds: But they express themselves differently as to
alder-

aldermen; *they* are said to be *elected*: But the burgessees are *admitted for their land*; which distinction very strongly expresses the nature of the right, and the manner of exercising it.

According to one of the most antient ordinances* in the constitution book, the term *freeholder* appears to have been used as synonymous with *burgess*, and to describe the same person. That ordinance imposes a penalty on the freeholders, *generally*, in certain cases; which implies, that as such they were *all* subject to the ordinance; and this could only be by reason of the corporation's being formed of them alone, and subsisting in right of such tenure.

After having proceeded thus far, can it be doubted, that the freeholders or burgage tenants alone, elected the members during the whole of this period? If then the right was ever established in them, and not exerted in any corporate quality, it must at this day be determined to belong to them, and the members of the corporation must be excluded. This point no lawyer will deny; because no charter, no length of time, no want of exercise, can destroy a right of this public nature.

In this point of view the charter of Cha. II. cannot be considered to have had any operation

* See it in p. 125.

upon the right of election. The king could not alter it in any case. The resolution of the Committee and the House, in the case of Chippenham in Glanville, (p. 54) expresses the reason and authority of the law upon this subject. It was resolved in that case, that a charter of Queen Mary, giving the election to a select number, "*did not, nor could alter the form and right of election for burgeses to the parliament, from the course there before, time out of mind, held. The charter, although it may incorporate this town, which was not incorporate before; or may alter the name or form of the corporation, in matters concerning only themselves and their government, rights and privileges; yet it cannot alter and abridge the general freedom and form of election for burgeses to the parliament, wherein, as aforesaid, the commonwealth is interested. For then, by the like reason, that it might be brought from the whole commonalty, or from all the burgeses of a town, to a bailiff and 12, so might it be brought to a bailiff and one or two burgeses, or to the bailiff alone, which is against the general liberty of the realm.*" Besides, this charter was one of the garbling charters of Cha. II. originating in his wicked designs against the constitution; and therefore ought not to be received favourably in courts of justice, especially on a constitutional question; according to the opinion which Lord Hardwicke has been known

known to declare with regard to these charters in general*.

But the evidence affords another argument against this charter, viz. that it was not accepted, further than was necessary for the internal government of the corporation, and not in respect of parliamentary elections. This is to be inferred from the uninterrupted practice after the time of the charter: None but freeholders elected, and no man signed returns, upon any other right than that of land in the borough. All those names of which any trace exists, are proved to be those of persons having this title, before they became

* I have not been able to find the opinion here referred to in the book of Reports of the time of Lord Hardwicke. I suppose the case from whence it was cited, is that of the King against Johnson, concerning the city of Chester, in 1733; which has been lately printed from a manuscript note of the late Mr. Masterman of the Crown Office, in an account of the Chester cause, tried in 1786. In Johnson's case, upon the defendant's shewing cause why the *quo warranto* information should not issue, some attempt was made on his part to found his title on the charter of Charles II. granted to the city of Chester in 1684. Lord Hardwicke, in giving his opinion, says of the charters of Charles II. "These charters have never been countenanced in Westminster hall; and I will not give an opinion in support of them, unless the *strongest* evidence in the world be laid before the court, of their being accepted and uniformly acted under ever since."

corpo-

upon the right of election. The king could not alter it in any case. The resolution of the Committee and the House, in the case of Chippenham in Glanville, (p. 54) expresses the reason and authority of the law upon this subject. It was resolved in that case, that a charter of Queen Mary, giving the election to a select number, "*did not, nor could alter the form and right of election for burgesses to the parliament, from the course there before, time out of mind, held. The charter, although it may incorporate this town, which was not incorporate before; or may alter the name or form of the corporation, in matters concerning only themselves and their government, rights and privileges; yet it cannot alter and abridge the general freedom and form of election for burgesses to the parliament, wherein, as aforesaid, the commonwealth is interested. For then, by the like reason, that it might be brought from the whole commonalty, or from all the burgesses of a town, to a bailiff and 12, so might it be brought to a bailiff and one or two burgesses, or to the bailiff alone, which is against the general liberty of the realm.*" Besides, this charter was one of the garbling charters of Cha. II. originating in his wicked designs against the constitution; and therefore ought not to be received favourably in courts of justice, especially on a constitutional question; according to the opinion which Lord Hardwicke has been known

known to declare with regard to these charters in general*.

But the evidence affords another argument against this charter, viz. that it was not accepted, further than was necessary for the internal government of the corporation, and not in respect of parliamentary elections. This is to be inferred from the uninterrupted practice after the time of the charter: None but freeholders elected, and no man signed returns, upon any other right than that of land in the borough. All those names of which any trace exists, are proved to be those of persons having this title, before they became

* I have not been able to find the opinion here referred to in the book of Reports of the time of Lord Hardwicke. I suppose the case from whence it was cited, is that of the King against Johnson, concerning the city of Chester, in 1733; which has been lately printed from a manuscript note of the late Mr. Masterman of the Crown Office, in an account of the Chester cause, tried in 1786. In Johnson's case, upon the defendant's shewing cause why the *quo warranto* information should not issue, some attempt was made on his part to found his title on the charter of Charles II. granted to the city of Chester in 1684. Lord Hardwicke, in giving his opinion, says of the charters of Charles II. "These charters have never been countenanced in Westminster hall; and I will not give an opinion in support of them, unless the *strongest* evidence in the world be laid before the court, of their being accepted and uniformly acted under ever since."

corporators. With respect to the rest, the strength of evidence warrants a conclusion that they were like the others; and on the other hand, the sitting members cannot shew them to have been corporators. The returns of 1714 and 1718, more expressly declare the same thing. It is remarkable, that the *mayor's* individual hand and seal are affixed to the indentures. The common seal alone would have been sufficient, if the election had been made by the corporation; and the mayor, by affixing it, would have been bound. It is plain, therefore, that even the mayor, as well as all the rest, made the election as a freeholder. An elector who signs a return as a freeman, does not add his particular right of freedom, whether by *birth*, *servitude*, &c. So in this case, as freemen of the corporation, they would never have signified their freedom to be derived from their freeholds. It is impossible to believe, that if these electors voted as freemen, they would have involved themselves under the description of *freeholders*, as the words of the return import them to be. The names too, which appear in all the returns subsequent to Cha. II's time, are mostly of the same set of persons; which shews the practice to have been uniform and established.

If there should still remain any doubt as to the actual exercise of this right by freeholders,
the

the poll of 1713 affords the most satisfactory evidence of it. It is impossible that *Wadge* could have been described as a *new voter* in 1713, unless in right of his burgage; because he is proved to have been admitted a freeman *after* the date of this return*. In the same manner, two others who voted in 1713, were not admitted freemen till several years after: And in the elections of 1714 and 1718*, there are instances of the same sort; four in the former, and two in the latter, who were admitted into the corporation *after* they signed the returns.

At this period, living memory connects the chain of evidence. The facts related by the witnesses are not contradicted, and their account of the reputation is clear. It ascertains the right not only to belong to freeholders, but also in respect of antient borough tenements. It has been preserved by the declarations of corporators themselves; and the actual canvassing of them in 1741, in which even aldermen assisted, is a confirmation of it too strong to be done away. Even the modern charters of Cha. II. and the present king, contain a grant of the *burgage rents*, although their object was to destroy the rights of those who pay them.

It is not surprising, that the freeholders did not claim, in the election of 1772; because cir-

* This was proved from the book.

cumstances gave them no reasonable prospect of success. The candidates also were strangers, who derived their whole support and information from members of the corporation, on each side. But these public rights are not to be determined by the conduct of individuals; nor do they depend upon any private support. They are not the subject of alienation or resignation. Even rights of private property, in which the public has an interest, as a peerage*, or an office, if proved to have existed in the most remote antiquity, would be adjudged now to the true descendant of the first possessor, without his proving any intermediate possession of it. Much more, ought this principle to be enforced in a question of merely public concern. In such cases men ought not to look for proof of mathematical certainty; reasonable evidence is sufficient in the conduct of all human affairs.

The true question to be considered is, whether there was not a period, in which the freeholders of the borough alone, had the right to elect the members. If there ever was, what has happened to change the right? Is it, that the bur-
gage rents are gone? These still exist in contemplation of law: Besides, the non-claim or release of rents and services, by the lord of a

* See Lord Purbeck's case in Shower's Parl. Cases.

manor or borough, cannot destroy the effect of the tenure, or the right of the tenants. Is it, that the number of burgages is not ascertained? As many tenements as can be proved to be *an-tient*, and no others, can claim it. Was there any renunciation? There neither has been, nor can be. Is the right lost by length of time? That also is impossible from the nature of the case. But, in fact, the exercise of their franchise is brought as low down as the year 1753; for, from that period only, can it be proved that any persons have voted in elections who were not freeholders of Saltash. The great anxiety, about this time, shewn by the leading men in the corporation, to suppress the freeholders, argues them to have been sensible of their privileges. But if the Committee should establish the right derived from the modern charters, they will decide that the tenure of land confers no privilege in Saltash, and that all the evidence of antiquity relating to it, is either false or futile.

If the decisions of the former Committees are to determine that of the present members, the judgment will not be theirs. In such case they would surrender their own understandings to the discretion of others. But the Committee, by having resolved to hear the case through,

will, no doubt, form an opinion of their own upon it.

Argument for
the Sitting
Members.

The counsel for the sitting members, in answer to the above arguments, contended, That Saltash was a corporation by prescription: That its representatives had always been elected by the members of this corporation; and, consequently, that these alone had the right of election. They said,

The principal subject of inquiry upon the evidence produced, is, by whom the members for this town were elected, at the period of their first appearance in parliamentary history, in the 6th year of the reign of Edward VI. If there were then no corporation in Saltash, the members of the modern corporation can have no right to elect. On the other hand, if there were a corporation at that time existing, and if the representatives were elected by its members, the right cannot now belong to persons of another description.

The charter of Valle tortâ, in itself contains proof of a corporate existence, in the burgeses to whom it is addressed: For though it is now understood as a settled rule of law, that the king alone can grant a corporate privilege; in antient times, under the feudal system, this
power,

power, to a certain extent, was not considered to be peculiar to the sovereign, but was exercised by every feudal lord *. Though this charter contains the expressions, from whence the petitioners infer it to relate to the landed rights of the burgesses, as individuals, yet it has others likewise, that peculiarly import a corporate sense. Thus they are to have a *præpositus* of their own election: Now, such election cannot be made by any but a *corporate body*. No imposition for the lord's use is to be laid on the burgesses *nisi per voluntatem mercatorum*. This expression implies the existence of a guild of merchants, and emphatically describes a corporation, according to the authority of Lord Chief Justice Rolle, in his abridgment; who there mentions the phrase *Gilda mercatoria*, as in itself containing the grant of corporate privileges, when used in a charter †. It appears in the same author, that a grant of lands to the inhabitants of a vill, reserving rent, incorporates them for all the purposes of enjoying their land, according to the grant (D). So the charter prohibits any trading ship from passing certain bounds *contra libertatem ejusdem villæ*. Now such *liberties* as are there alluded to, are altogether of a corporate kind; and this shews, likewise, that the benefit of trade, which was a

* See Vol. I. p. 102, note A.

† 1 Ro. ab. tit. *Corporation* F, p. 513.

leading motive to the first creation of corporations in Europe, was one of the objects of this charter.

The legal accuracy of expression of modern times was unknown at the time of this grant. It is sufficient for the present purpose, that at that period, the above terms were understood to make a corporate institution. The use of the word *heirs*, and the provisions respecting the land of the burgesses, will not prevent this operation of the charter, any more than the holding lands aggregately, will prove the persons to be a corporation. Madox, in his *Firma Burgi*, chap. 2 and 3, and in the notes subjoined to them, shews several instances where *corporations* have held lands, under grants to them and their *heirs*; and where lands antiently were held by the inhabitants of towns not corporate.

Here is, therefore, ample authority for contending, that the burgesses of Essa were *incorporated* by the above charter (C). But if it were otherwise, the recital in Queen Elizabeth's charter proves it to have been a corporation earlier, (if it was a corporation at all, before her time); for that establishes it by *prescription*. Again, the charter of Richard II. confirms the privileges to them and their *successors*. This alone implies a body corporate. So that without

out question they were a corporation from that time at least.

Further, the charter of Elizabeth creates the freeburgesses of Saltash, "*in aliud corpus corporatum*;" and grants to them all the privileges held under any former right of incorporation. The stile of the first ordinances in the constitution book, previous to that charter, and particularly of the ordinance first read by the petitioners, is in the usual form of the bye-laws of a corporation. This particular ordinance is alone sufficient proof of a corporate authority. Besides, it is possible that there may have been other charters from the crown, though not now extant: And there have been instances in which the evidence of long usage, has induced the courts to presume a royal grant or charter. The cases of Eldridge and Nott, in Cowp. 215, the mayor of Hull and Horner ib. 102, and Powell and Milbank there cited, are of this sort. The corporation, therefore, existed long before the town was represented in parliament.

The charter of Valle tortâ proves, that at the time of its date, Saltash was not a royal borough; and therefore, if a parliament had then existed, it would have made no constituent part of it. Representation must derive its origin from the crown: Therefore this charter neither did, nor could give that privilege; and, consequently,

did not give the means of exercising it. By an original charter of incorporation, the crown might have conferred the right of electing members of parliament, upon the members of the corporation, as a personal privilege. There is not, indeed, express proof of such a grant to this borough; but when it first appears to have sent representatives, it appears in a corporate character. If the question rested on presumption, therefore, it would be *presumed* that the members were elected by a corporate body. But the returns previous to the charter of Elizabeth, actually *prove* the elections to have been made by the corporators before that charter. They are under the *common seal*, and made by the *mayor and community*, or the *mayor and burgessees*; a form and stile necessarily descriptive of a corporation. For though the word *burgesses*, standing alone, is open to other constructions, yet when joined to a *mayor*, it is a corporate name. Every subsequent return is likewise under the *common seal*. A common seal is one of the distinguishing badges of a corporation (D.) And though modern instances might, perhaps, be produced of its being seen in other hands, it will be found, on examination, that those instances are an abuse only in practice, and proceed on an acknowledgment of the above general rule. In the same manner, the word *community*

munity is a word implying a corporation, when applied to places in which a corporation exists; and when joined to a mayor, it is a corporate name.

The clause of Queen Elizabeth's charter, by which she impowers them to send burgesſes to parliament, is not an original grant, but of confirmation only; for the town had been regularly represented in former parliaments *. The charter being only confirmative, in reſpect of the representation, it is to be inferred from hence, that it is equally ſo in reſpect of the right of election, which is appointed to be by the *mayor and freeburgeſſes*. It is to be preſumed, that the crown acts according to law in its charters; and therefore this clause of the charter confirmed a ſubſiſting uſage in the borough.

The uniform ſtile and execution of the returns, demonſtrate that the corporation had a part in the elections, both before and after the charter of Elizabeth; this is fact, not ſpeculation. Is it not more juſt to ſuppoſe, from hence, that the corporation *alone* elected, than that they formally

* The town of Chippenham (whoſe charter was the ſubject of the reſolution, cited in p. 172) had ſent members from the beginning of parliaments: Yet there too, the charter of Mary contained a grant of the right of ſending representatives, in the ſame manner as this of Elizabeth to Saltash. See note (A.)

authenticated an act performed by others? The burgage tenants, as such, could neither have a mayor, nor a common seal. It has been said, that though they might have been freemen at the same time, yet they acted as freeholders; but this supposes, that the electors themselves knew not in what right they voted. The return itself affords the best evidence of the authority by which it was made, which is manifestly a corporate act.

In order to avoid the decisive advantage which the members of the corporation derive in this question, from the charter of Charles II. the counsel have contended, that it was only accepted *in part*, and that such acceptance may be lawfully made. It has been said, indeed, by a great lawyer, that in certain cases there may be a partial acceptance of a charter: But this relates only to existing corporations receiving additional privileges; and even this point has never been judicially determined. But it never has been said by any authority, that an *original* charter of incorporation could be accepted *in part*. The new creation must be conformed to entirely, or entirely rejected*.

The

* The opinion alluded to here, is one of Lord Mansfield's upon the Cambridge University Case, reported by Sir James Burrow, 3 vol. p. 1656, in these words: " There is a vast deal

The charter of Charles II. was of this sort :
The old corporation was extinct by the surrender to the king, as soon as it was accepted

deal of difference between a new charter granted to a *new* corporation, (who must take it as it is given) and a new charter granted to a corporation already *in being*, and acting either under a former charter, or prescriptive usage. The latter are not obliged to accept the new charter *in toto*, and to receive either all or none of it : They may act *partly* under it, and partly under their old charter or prescription." This opinion seems to be given with reference to a supposed case of two charters, inconsistent with each other. In the case of the city of Chester, argued in the court of King's Bench, in Hillary Term, 1787, this question having been raised in argument at the bar, Mr. Justice Buller spoke upon it to the effect following : He said " he knew of no authority that warranted a notion, that a corporation might accept a charter in part, and reject it in part : That the only possible case for it, might be, where a charter granting two distinct benefits to the body, one might be accepted without the other ; though even of this he doubted. But that certainly, if a charter were to contain a grant to a corporation, such as to have a mayor, 12 aldermen, and 24 common councilmen, in such case the body could not choose for themselves, and retain part of them : As, for instance, reject the common council, and retain the aldermen."

This question has been, on former occasions, treated in such a manner as to be left in doubt. It seems to me, that the cause of this confusion may have been, that a subsequent charter has been inconsistent with a former one. In this case only, it may be competent to the grantees, because *necessary*, to accept it partially : For otherwise there must be a partial surrender by implication, or a repeal of part of the subsisting charter.

of

of record; and the new grant was, in the legal sense of the word, *original*.

But even admitting for the sake of argument, the doctrine of the opposite counsel, the evidence does not warrant their application of it. For this charter is proved to have been acted under in every part; in the reduced number of aldermen, in the institution of a new officer in the corporation called the justice, in the constant observance of the day appointed for the mayor's election, different from that named by Elizabeth's charter, and in the election of free burgesses, at the pleasure of the corporation. But on the other side, they rely upon speculative arguments drawn from the uncertain state of the antient constitution, to found an exclusive right of voting in the freeholders.

Two modes of election have been pointed out by Lord Holt, either by burgage tenure, or by corporate right; and these he mentions as the *only* modes, and that the burgage tenure is the most general. But he must have been misrepresented here*; because the number of burgage tenure boroughs, is very inferior to that of the corporate boroughs; (there not being

* His observation, in the subsequent part of his speech here alluded to is, "as to the manner of election, every burgh subsists on its own foundation." 2 L^d. Raymond, 952, in the case of Ashby and White.

more than 29 of them) and there are many of mixed and concurrent rights. In short, no general principle can be laid down upon the subject. And even Lord Holt, whose authority they so much rely upon, in the same case lays it down, that a right of representation granted *within time of memory*, must be to a *corporation*, as no others are capable of receiving it. Yet in Saltash, the representation commenced within time of memory.

Burgage tenures mean no more than socage land in a borough; and exist in many places without giving a right of election †. But where-soever they give that right, the term *burgage* is perfectly familiar in the town; and every inhabitant knows which are the burgages possessing the franchise, and can describe them by their boundaries. Yet according to most of the witnesses in this cause, and the oldest, the people of Saltash had not heard the expression, till the beginning of the present litigation. An estate *in fee* makes no part of the qualification of burgage tenures; yet the ordinance read from the old book, makes it necessary to have such estate, before a man can enjoy the privileges of Saltash.

† As in London, York, &c. See Madox *Firma Burgi*, chap. i. sect. 8.

The evidence of the reputation which has been said to be *clear*, is quite otherwise; it is quite contradictory. Some witnesses suppose it to be a right in freeholders; some in freeholders and the corporation concurrently; some, in holders of old houses or scites; and some in freeholders residing in their own houses; only one witness speaks of burgage tenants. But Mr. Cleveland, though once a freeholder, never knew them by that name, and never paid a burgage rent for his tenement. How is it possible to reconcile these traditions to any certain conclusion? In the first petition presented to the house in 1780, they had so little thought of establishing a right in burgage tenures, that they alleged it to belong to *freeholders* generally. Even Harrison, upon that occasion which the petitioners consider as so important, in 1751, described himself as a *freeholder and inhabitant*. Where then is the period of this reputation to be fixed? This circumstance proves it to have been as unsettled formerly as now.—On the other hand, the evidence of the charters and returns in favour of the corporation, is uniform and certain. If the reputation arose from the abovementioned bye-law, as is most probable, it is inconsistent with the claim of the petitioners; for that requires land *in fee*. But the authority that made that regulation was compe-

tenet

tent to repeal it. This was done *in fact* as soon as the corporation began to admit persons among them who had no land. The ordinance was plainly an *innovation* at the time it passed, and might be departed from, whensoever the corporation who made it, might think proper. Previous to it, no qualification by land was necessary: While it existed, the right of admission to the corporation, and consequently the right of voting, depended on land. The period of its existence, was long enough to establish those forms of practice in the corporation, of *doing fealty* and *entring deeds* upon admissions, from whence it is easy to trace the origin of that traditional evidence now brought forward. After the corporation had annulled the bye-law, they had a general right of admitting all persons burgesses indiscriminately, and the old forms became useless.

A corporation has necessarily incident to it, a power of continuing its members by election; and where no particular mode of election is pointed out in the first institution, this power resides in the whole body. There being no evidence of any particular institution of this sort in Saltash, before the charter of Elizabeth, and none being given therein, the corporation possessed this incidental power after that charter, just as before. A corporation may limit itself

in the exercise of this power; and such limitation appears to have been made here by the above ordinance. But the acceptance of the charter of Charles II. absolutely repealed any limitation of that sort; and the subsequent continuance of the old forms in practice, could not alter the *right*. If there is no mode of obtaining representation but by charter, then the corporation manifestly possesses it by the charter of Elizabeth; the acceptance of which was conclusive upon all who received it, and the rights and powers of which were continued by the charter of Charles II. The right of electing representatives, no doubt, cannot be altered, or affected by any bye-law; and therefore this ordinance, however it might restrain the enjoyment of the *liberties of the town*, could not include among them, that of voting at elections. If the freemen only had it before, it remained to them in the same manner afterwards.

Mr. Gaborian stands alone in his evidence, in applying the term *freeburgesses* to the freeholders, and in this is contradicted by the other witnesses; nor is the circumstance in itself probable. It is also contrary to the terms used in the returns of 1714 and 1718, in which these words are contradistinguished from each other. The witness speaks under disappointment in his expectations

pectations in the borough, and on that account his evidence should be received with distrust.

Mr. Cleveland's expression of *recovering* the right, shews at least that *he* considered it to have been lost. If it had been thought established according to the returns of 1714 and 1718, is it probable that it would ever have been abandoned? The number of freeholders is stated to have been 150: Yet that of the corporators seldom exceeded 20; except for a short time, during the dissensions which occasioned the new charter. They could at all times have trebled the whole number of the freemen, and yet never offered to disturb their repeated exercise of the right. In 1772, when the witnesses say there was a strong contest, all the freemen together did not amount to 20; yet no freeholder thought of suggesting their pretensions to either candidate. Even admitting the excuse respecting Mr. Buller's interest, there was more than enough without him. The reason given for the former acquiescence, in compliance to Mr. Cleveland, cannot, in the nature of things, have been the real cause of it. It is not credible, that a man would allow another to deprive him of such great advantages of his property, out of friendship; or that a man's *friend* would be instrumental in such an act. Nor is it credible, that such a valuable privilege as is

con-

contended for, would have been passed by, in a public survey and sale of the lands to which it is now supposed to appertain, so lately as since 1772; if there had been any sincere belief of the existence of the right, or of the means of establishing it, in the minds of those whom it concerned. All these circumstances, connected with the length of possession on the same side, much outweigh the vague account of reputation.

It is remarkable, that the returns in 1714 and 1718, are under the common seal, like all the rest. The particular form used upon those occasions, differs from every other; and being found only in two instances out of so many, must be considered as irregular exceptions to the general course. The body of the return is the material part of it; and that like all the rest, declares the election in these instances, to have been made by the *mayor and burgesses*, i. e. by the corporation. The persons who sign their names, do it in the form of attestation, "In witness whereof, &c." i. e. in witness of the said election by *the mayor and burgesses*; and do not state the election to have been made in any other right, than that which the form describes. The *time* of the first appearance of these returns is very material; it was at the beginning of the Hanover succession, and when the kingdom was
in

in a very unsettled state. This may have given encouragement to new schemes in politics. Perhaps Mr. Buller, the Recorder, may have entertained a notion of converting this into a bur-
gage tenure borough, with a view of aggrandizing his fortune and family under the new government *. Something of this sort must be
recurred to, in order to account for the singular and temporary distinctions of these two returns.

The new evidence upon the present trial, called the *Copy of a poll*, comes out in a very suspicious manner, and deserves but little credit. Though two trials have been had upon the question, it has never been heard of before. But when attentively examined, it will be found

* This method of explaining the circumstances of the returns, is not very probable. Mr. Buller is said to have opposed the court measures at this time; and the friend whom he supported, Mr. Shippen, was a determined enemy to them. It was not long after this election, that he was sent to the Tower by a vote of the House, for speaking disrespectfully of the king and his family. See 18 Journ. 653. 4 Decr. 1717. Hill and Bladen the petitioners against the election in 1714-15, in which the Buller interest prevailed, (as mentioned in p. 133 in the note) were for the court; as may be inferred from the promotion of the first of them to an Irish peerage, and a seat in the privy council of Ireland; and of the other to a seat at the board of trade, about two years afterwards. See *Chronological Register* of the year 1717, in July and September.

to add nothing to the case of the petitioners, and rather tends to shew, that the right of freeholders was not then established. It is more likely to have been a paper of one of the candidates, containing a state of the votes, than a copy of the poll. It has four names set down, which do not appear to have voted, though they might have turned the election; they are no part of the poll, and inserted only as a private observation of the writer. But admitting it to be a state of the poll, how does the case stand? There are only thirty-one votes in all, though the borough is said to contain five times that number of freeholders; (and it should be remembered, that the being received on a poll, is not proof of the validity of a vote.) Fifteen voted for Elford, 12 of whom were corporators: Bladen, the losing candidate, had 12, of whom only six were corporators*. So that if he could have set aside the three who were not so, upon Elford's poll, there would have been still a majority against him, and that probably was the reason why he did not petition. It is not to be believed, that the numbers in a contested election, would have been so few, if the freeholders had at this time been allowed to vote. Further, the return of this election is signed by only two or three who are not corporators.

* This was proved from the books.

Much stress has been laid on the names signed to the returns; but the signing is not proof of voting, nor part of the election. None of the returns before the time of Charles I. have any names signed to them. Several persons are proved to have signed, who had no pretence to be called voters, and many more may have signed in the same way. In 1741, this was the case; therefore the trick, as it is called, to avoid the effect of Harrison's signing, was certainly not peculiar to the election in 1751.

All that can be collected from the evidence relating to the election in 1722, supposing it to be true, only proves, that freeholders at that time *claimed* to vote; for there is no evidence of *voting*, or even of the production of deeds, or of the returning officer's having asked for them: And the event renders it probable, that they did not vote; for Buller and Carew, who were most likely to have succeeded upon that interest, were defeated and did not petition.

From this period, to the year 1780, they have not endeavoured to enforce the claim. If after having lain so long dormant, it should be countenanced now for the first time, encouragement would be offered for endless questions in almost every antient borough in the kingdom. In 1714, when this question was first stirred, many were living who could have remembered the proceedings

ceedings of the last century, and perhaps all the records of the borough were then in existence. If the right had been such as the petitioner contends for, they must have contained abundant evidence of it. The first and second numbers of the constitution book *, probably existed then, and their contents could not have been unknown. Therefore the neglecting to prosecute this claim at that time, affords a very strong argument against it, and gives reason to believe, that the freeholders of that day were afraid to risk a trial, from a sense of the weakness of their cause.

The counsel concluded, with warning the Committee against the dangerous precedent they would establish, if after two concurring decisions upon the case, they should open a new scene for litigation, by deciding contrary to them.—That the weight of two solemn judgments of an impartial court of justice, ought not easily to be moved.—That on this third trial, the petitioners had not in the least strengthened their case, but that on the part of the sitting members, the argument had acquired additional force.

Reply. The counsel for the petitioners observed in reply, That if the privilege in ques-

* See p. 124.

tion had ever been annexed to land, or tenure, it was immaterial by what name it might have been called; whether the persons might have been called burgage tenants, owners of antient houses, or simply freeholders; in either case it means the same thing. It would be in vain to endeavour to raise a puzzle about names, if the substance of the right were established: If it did not antiently belong to the corporation, it cannot at this day, and must be adjudged to the owner of land.

Without discussing here the position, that the right of representation could not be derived from the original charter of Valle tortâ, (which might perhaps be denied) the truth of it may be admitted in this argument; because when the borough became the property of the crown, the tenants held of the crown in the same right as they had before held of their lord. This is implied in the first royal charter of confirmation. The alteration of the feignory made no change in the state of the tenures. The confirmation is made to them *and their heirs* as well as *successors*; therefore if the tenure conferred any privilege before it became a royal borough, that privilege remained as before. This argument therefore leaves the case in the same state as it found it.

It is not necessary for the petitioners to contend, that this was not a corporation antecedent to the charter of Elizabeth; because, whether it were or were not, the evidence leads to the same conclusion, viz. That it consisted of the same persons as composed it afterwards, and till 1753, i. e. of burgage tenants. Queen Elizabeth found them a feudal corporation so composed, and necessarily erected them in *ALIUD corpus incorporatum*, and substituted this body corporate as lord of the borough instead of the crown: But this could not affect the preceding right of election in these burgage tenants.

It has been said, there may have been some other charter, besides those which appear; but there is no usage in this case that can lead to any such presumption.

It is impossible to have other proof of voting, where there is no contest, than that of attending the election, and signing the return; the signature is even more effectual than the voting, for it is the act of election complete.

The observations of Glanville * on the forms of returns, diminishes the effect which the counsel on the other side would attribute to the form and attestation of the early returns for this borough. There are many instances in which the

* P. 35 and 36 of his reports, before recited in the Lyme Case, p. 76.

returns are made under the common seal, or by the corporation, though the election is made in a different right; as in the case of Aldborough * in Yorkshire, when the inhabitants at large elected, 10 Journ. 418.—Of Preston *, before the Select Committee, in 1781, in the same circumstances.—Of Windsor *, where paying scot and lot gives the right.—Of Bridport †, 12 April, 4 Chas. I. 1 Journ. 882. and 29 Journ. 204. and Shaftesbury, 11 Journ. 478. which are the same. In the latter case, there were 22 returns under the common seal, and in the corporate name. St. Germain's has no corporation, yet there is a common seal to its returns ‡.

Where there happens to be a corporation, what is more natural, than that the mayor, as returning officer, should affix the common seal to a public act? In the returns of Saltash in 1714 and 1718, at which time, it is not denied on the part of the sitting members, many signed who were not corporators, the common seal was used. The argument that these persons signed

*** See vol. i. p. 16.

† See p. 93 in the case of Lyme.

‡ The return for St. Germain's in 1768, is in the following form. "In witness whereof the Portreve and Bailiffs have put their hands and the *common seal* of the borough." It is signed by the Portreve and 14 others; and has a seal which, as I have been informed, contains the arms of the Eliot family. See Note D.

their names only to *attest* the election, and not as having made it, is a mere play upon words. It is impossible to read these returns without being convinced, that the burgage tenants in this act, made a direct and positive declaration of their right, and of their exerting it upon that occasion.

They would infer on the other side, that it had been a practice, to admit strangers to sign their names to the returns; but the only poll extant carries convincing proof of the contrary. None signed the returns of 1713, who are not on the poll as voters for the successful party; but several voted who did not sign the return. Besides, the same names continually occur in these returns. The indorsement on this copy of the poll, dated the day after the election, proves also, that it could have been no other than a copy of the real poll, and not a paper of calculation. This paper affords positive proof, of what without it, rested on presumption; namely, the actual voting of freeholders in that right. If it had been discovered before the trial of the first petition, it is probable that trial would have had a different conclusion. It cannot be supposed that it would have been suppressed on the part of the petitioners, being so strong a confirmation of their case. If any imputation falls upon either party on account of the
the

the want of written evidence, the corporation should suffer for the destruction of their own books. Supported as the petitioners have been by the partial remnants of the corporation records, they would search every other with confidence.

What would be the event, if on a trial of this sort in Westminster-hall, the defendant (as is the case here) should call no witnesses? The judge would direct the jury to believe, that every inhabitant of the town would say the same as the rest, because the defendant does not venture to examine one of them. Here then, the sitting members may be said to have the unanimous evidence of the whole borough in their favour. It is scarce possible that such opinion should not have been founded in fact. If eleven witnesses, in a private suit, had proved such a reputation of a prescriptive right, without any others speaking to the contrary, a judge would hardly take the pains to sum up the evidence to the jury: He would consider the case as established beyond a doubt.

The petitioners absolutely deny *any* right in the members of the corporation; but even if that point could be determined otherwise, it ought not to deprive the freeholders of the right belonging to their tenure. Upon a supposition of such concurrent right, the majority would still be for the petitioners in this election.

The

The counsel for the sitting members, observed upon the cases newly introduced into the argument, in reply, That in those boroughs mentioned, the right of election had been established by resolutions of the house, which had often passed contrary to the evidence and justice of the case; and therefore it was not to be wondered at, if in consequence of them, a practice had been introduced discordant with principles.

After the arguments were finished, the Committee deliberated on this case on the remainder of the day, and on the whole of the next, when they determined,

That the sitting members were duly elected,

Of which the chairman informed the house, on Monday, April 25 *, (E).

When the copy of the poll before stated, in p. 156, was produced, the counsel for the petitioners said, they offered it in evidence, as a copy of a poll found about a month before, in Mr. Buller's house, among other family papers: That it would be proved to be in the hand writing of a man, who was clerk to his ancestor the *Recorder of Saltaish*, on which the Recorder had written a memorandum; and in company with which, was a letter

* 40 Journ. 888.

from one of the Corporation to the Recorder upon that election.

The counsel for the sitting members objected to the admissibility of the evidence, to authenticate such a paper: Because it did not appear, that any original poll had been taken or kept; nor that (if ever existing) it had been lost; nor that this copy had been examined with it: That it had a very suspicious appearance, having memorandums made upon it in different writing and ink from the rest, which were only private observations; and though not legal evidence, would be received together with it:—That in the report of the last Downton cause, there was a case in point, in which that Committee had resolved to reject the evidence of a copy of a poll under similar circumstances*.

The counsel for the petitioners observed, That the copy of the poll in the Downton case, was not properly accounted for, as it was not proved to be the *best* evidence, by the loss of the original; but that here, all the papers of the borough were proved to have been lost. That where an original is lost, a copy is evidence, and it is not necessary to prove the copy to have been examined with it †. That this plainly pur-

* See vol. i. p. 277-8.

† The following case was cited upon this point, from 1 Mod. 4. “ In *Ejectione firmæ*, the plaintiff, at the trial, offered

purported to be a copy of the poll, and corresponded with the return of the election †. That there could be no just cause of suspecting it, as its present use could never have been foreseen by the writer; and it had been preserved among the family papers of those most likely to possess it rightfully. That the objection came very unfavourably from the corporation, who could give no account of the loss of their records.

The Committee resolved to admit the evidence.

On the same day the petitioners offered another paper, as a copy of a poll, in December 1718; but it was not properly authenticated by evidence, like the former, and on that account, not received by the Committee.

offered in evidence, a copy of a deed that was burnt by the fire. The copy was taken by one Mr. Gardner, of the Temple, who said, he did not examine it by the original, but he writ it, and it always lay by him as a true copy. And the court agreed to have it read, the original deed being proved to be burnt." In the Report of the same Case, in 2 Keb. 546, it is said, the court held it to be good evidence, "as well as testimony of a witness of the contents of a deed burnt; which was allowed to my Lord Cooke, who witnessed a conveyance in Sir Christopher Haydon's Case; and in one Douse's Case at the Oxford Assizes, the like evidence: And *per Twissden*, in Thin's Case, such a copy was allowed without examining."

† This was produced in evidence.

The

The CASE of the BOROUGH of SALTASH in 1787.

A WRIT having issued in the month of Oct. 1786, for electing a member for Saltash, in the room of the present Lord Hawkesbury, upon his promotion to a peerage, a contest ensued between the same parties in the borough who had contended before. Lord Mornington was elected by the members of the corporation, and returned. Major Lemon, who opposed him, was supported by the burgage tenants. There were nine votes on the poll for the sitting member; but 41 persons tendered their votes as burgage tenants for Major Lemon, who petitioned against the election and return of Lord Mornington. His petition stated generally, "That the mayor and returning officer behaved with partiality in favour of Lord Mornington, by rejecting the votes of several persons who had an undoubted right of voting, and who tendered their votes for the petitioner; and by admitting on the poll for Lord Mornington the votes of several persons who had no right to vote, whereby he was improperly returned as duly elected *."

* See Votes, p. 72, Feb. 7, 1787.

The Committee appointed to try the merits of this election met April 25, 1787, and consisted of the following members :

Sir John Trevelyan, Bart. *Chairman.*

Francis John Browne, Esq;	John Kynaston, Esq;
Henry James Pye, Esq;	Lord Duncannon.
John Scott, Esq; of <i>Westloe</i> .	Edward Rushworth, Esq;
Joshua Grigby, Esq;	Hon. Chapple Norton.
Charles Alex. Crickitt, Esq;	Thos. Edwards Freeman, Esq;
Jeremiah Crutchley, Esq;	John Fenton Cawthorne, Esq;

Lord Viscount Maitland, petitioner's nominee.

William Young, Esq; sitting member's nominee.

The hon. Mr. Erskine and Mr. Serjeant Lawrence were counsel for the petitioner; Mr. Graham and Mr. Douglas for the sitting member.

The general state of the case in evidence and argument, upon this trial, being the same as before, except in some points which I shall mention, I have thought it better to publish my report of the former trial, as it stood before the present; and only to note the particulars in which this case differs from that.

The counsel for the sitting member did not think proper now to repeat their objection, raised upon the authority of the former decisions, to the petitioner's right of proceeding in the cause*.

* See before, p. 109.

On the part of the petitioner the same evidence was produced as before, except that his counsel did not read the ordinance from the constitution book, recited in p. 125 *; but the sitting member read it, as making for him.

The additional evidence of the returns has been already noticed in those places to which they related †. Some doubt was intimated by a member of the Committee as to the propriety of producing the constitution book in evidence, without giving an account of the persons or place from whence it came. This occasioned a reference to the minutes of the first Committee of 1781, for the evidence of a Mr. Vial, since deceased. This gentleman was steward to Mr. Buller; and when the latter resolved to bring forward the question of the right of election, previous to 1780, went by the direction of Mr. Mayhow, formerly town clerk of Saltash and then residing abroad, to a house of his, in which several papers belonging to him were deposited, to search for such as contained any information relating to the affairs of the borough. There Mr. Vial found this book, in the state in which it was produced to the Committee: Many leaves had been cut or torn out, but it was then regularly paged; which must have been done subsequent to the mutilation of it.

* The last in that page.

† P. 132, 3.

When

When the copy of the poll of 1713 was offered in evidence, the counsel for the sitting member objected to its admissibility; and supported their objection by the same arguments as I have related in the former report; which received a similar answer from the other side, and the same decision from the Committee.

The most material difference in the petitioner's case consisted in a paper discovered since the former trial, containing instructions for a poll previous to an election in 1722. The counsel for the petitioner offered it as a paper, shewing the reputation then received of the right of election, which they would prove to be in the hand writing of Mr. Hickes, at that time town clerk of Saltash, and long since dead, containing his opinion upon the point. Hickes was an active partizan of the party that opposed the Buller interest in that election.

The counsel for the sitting member objected to this paper's being received in evidence. They said, That the situation of Hickes on this occasion, was such as to render any opinion of his upon the subject, conveyed in such a manner, and at such a time, nugatory. That no opinions of men could be considered as containing evidence of reputed usages, but such as were *impartial* and soberly given; but this paper would

shew the conduct of an *agent* in a contested election; who necessarily strains every point, and uses every means in his power, of gaining his object. That Hickes was known to have been an attorney, and probably acted in that character here: It is the duty of such men so employed, to prepare for every difficulty; and if this paper really were, what it purports to be; instructions for a poll previous to the election, of course it would be contrived so as best to serve the purpose of the party, for whose use it was made. Objections might have been expected that were never actually made, and a state of votes given that never took place. That, in short, it did not appear that the paper was ever made use of at an election, or ever left the desk of him who made it; and under these circumstances could not be relied on, as containing evidence of reputation of the right of election:

On the other side it was contended to be admissible and proper evidence, to shew that the town clerk, a member of the corporation, entertained the opinion to be discovered from the contents of this paper, of what the right of election was; particularly, when in favour of a right making against the corporation. That if any person had heard him declare his opinion to the same effect, it might be given in evidence

by such person now; and much more is it to be received, in its present state, when reduced into writing, and so far, more certain than when delivered from the memory of a conversation had long ago. That even if Hickes had been an attorney for the party, (though that was not the case for aught that appears) the contents of the paper were such, that this circumstance would not prevent their operation, to shew his indifferent and impartial opinion upon the subject; because it shews, that both parties must have acted upon an acknowledgment of the same right of election. That the paper was not produced as evidence of any *fact* relating to the election; as, that A. had a vote, or B. had not; that C. was a freeholder, or D. a freeman; but merely that the town clerk *thought* that burgage tenants had the right of election in Saltash: That in this view it signified little upon what occasion, or for what purpose, the paper might have been framed; because these circumstances could not in the least affect the conclusion to be necessarily drawn from it, of the writer's sentiments, in regard to the constitution of the borough.

The Committee were of opinion, that the paper was admissible evidence.

A person who had been Hickes's clerk, proved it to be in his hand writing; and said Hickes was an attorney. No question was asked as to the time

Saltaſh 13th April 1722

Inſtrucons for a Poll att an Elecon for 2 Members to ſerve in next Parliam^t.

Thomas Swanton Eſq^r Edward Hughes Eſq^r S^r W^m Carew Bar^t John Francis Buller Eſq^r

1 Mr Edw^d Lean Mayr

2 Mr Chriſt^r Hill

3 M^r John Hickes

4 M^r John Wynnell

5 Thomas Luſkey

6 William Parnell ſen^r

7 John Preſton

8 Henry Preſton

9 M^r William Lark

10 Richard Garude

11 Nick^s Stephens

12 Samuel Stephens

13 John Joſnſon

14 Benedi^t Cruſt

15 Major Tucker

16 Tho^s Dennyſ—If at home

17 Benjamin Wedge[†]

¶ Note—The above are all ſworn free burgeſſes—If tother ſide object to Major Tucker voting for that he hath not lived in town for ſome time & that he ſold his lands.

Anſ. He is an Officer in the Army & his habitation any where And he hath made a new purchaſe and hath the deeds, And then you muſt object ag^t Owen Teage's voting for that he nor his family hath lived in Saltaſh for many years laſt paſt

18 M^r Tho^s Lean

19 Robert Pyper Hellyar

20 Francis Chapman

21 William Soaper

22 Edward Couch

23 William Parnell jun^r

¶ Note—thoſe laſt Six have been polled but are not ſworne

24 Charles Williams

25 Thomas Webb

26 Jacob Stoakes

27 John Wade

¶ Note—Theſe laſt 4 are known to be votes are charged to rates &c
& have lived in town many years

28 M^r Edg Peiben

29 M^r Benjamin Young

30 M^r John Opie

31 M^r Rows Waits

32 John Gaborian

+ Here was a name (N^o 17) ſcratched out.

1 Mr Edw^d Lean Mayr

2 M^r Hill

3 M^r John Hickes

4 M^r John Wynnell

5 Thomas Luſkey

6 William Parnell ſen^r

7 John Preſton

8 Henry Preſton

9 M^r William Lark

10 Rich^d Garude

11 Nick^s Stephens

12 Sam^l Stephens

13 John Joſnſon

14 Benedi^t Cruſt

15 Major Tucker

16 Tho^s Dennyſ—If at home

17 Benjamin Wedge[†]

¶ Note—The above are all ſworn free burgeſſes—If tother ſide object to Major Tucker voting for that he hath not lived in town for ſome time & that he ſold his lands.

Anſ. He is an Officer in the Army & his habitation any where And he hath made a new purchaſe and hath the deeds, And then you muſt object ag^t Owen Teage's voting for that he nor his family hath lived in Saltaſh for many years laſt paſt

+

17 M^r Tho^s Lean

18 Rob^t Pyper Hellyar

19 Francis Chapman

20 William Soaper

21 Edward Couch

22 William Parnell jun^r

¶ Note—thoſe laſt Six have been polled but are not ſworne

23 Charles Williams

24 Tho^s Webb

25 Jacob Stoakes

26 John Wade

¶ Note—Theſe laſt 4 are known to be votes are charged to rates &c
& have lived in town many years

27 M^r Edg Peiben

28 M^r Benjⁿ Young

29 M^r John Opie

30 M^r Rows Waits

31 John Gaborian

+ Here was a name (N^o 17) ſcratched out.

1 Mr Matthew Veal

2 M^r Ford

3 M^r Nath^l Swetnam

4 M^r Rich^d Herring

5 Joſeph Williams

6 Jeffery Connell

7 Owen Teage

¶ Note—Theſe are all ſworn free burgeſſes

7 William Hingſton

¶ Note—Hath been polled but never ſworn—Title not good

8 John Botters

¶ Note—Hath done offices & is a good vote tho^t cant ſwear his old deeds

9 Arth^r Swetnam

10 John Ambroſe

11 Arth^r Swetnam

12 John Ambroſe—as Heyre to his father—&c

13 Robert Daubingſon—from his aunt—&c Title

¶ Theſe three & happens may be good votes

12 Jacob Wills

13 Charles Darton

14 William Jago

15 Clement Kneebone

16 John Wills

¶ Theſe 5 are old fagg^s

17 John Stephens

18 Parſon Millett

19 Thomas Williams

20 John Blowy

21 William Hodge

22 Richard Tucker

23 Peter Jago

¶ Theſe 7 are new ones

19 John Stephens

20 Parſon Millett

21 Tho^s Williams

22 John Blowy

23 William Hodge

24 Rich^d Tucker

25 Peter Jago

¶ Note The name of Benjamin Wedge, N^o 17, (a croſs vote for Swanton and Buller,) ſeems to have been interlined in the original, after the writing of the numbers for Swanton-was finiſhed; and that probably occaſioned an alteration of the figures, deſcribing the numbers following it, of which the original paper has the appearance: N^o 18, having been changed from N^o 17; and ſo on downwards to 32, which at firſt was 31, correſponding with the number of Hughes's votes.

time or place of its discovery. The adjoining page contains an exact copy of this paper; to which I have added the two explanatory notes, which the reader will observe at the bottom of it.

Another piece of evidence produced for the first time upon this trial, was a letter dated 24th of March, 1754, from Mr. Rogers, a member of the corporation of Saltash, father of the present Sir Frederick Rogers, to Mr. Cleveland, who was then member for Saltash, and for whom he was an active friend in the borough; in which, discoursing of the election then approaching, he informs Mr. Cleveland "of a report that Mr. Buller intended to make freehold votes; and considers whether it might not be proper to be prepared on their side with such *made* votes too, if he should take that step; but he concludes for taking no measures in this way then, lest it might alarm them unnecessarily, till he should learn with certainty whether Mr. Buller really had such a design or not."

The above new evidence afforded matter for observation in the speeches of the counsel; which I state in this place separately, because it makes the only material difference between the arguments, by which those of each side supported their respective cases on the present, and on the former trial.

The counsel for the petitioner observed on it, That Hickes, when he prepared these instructions for a poll, evidently believed that freeholders could vote, whether corporators or not; and that he acted upon this principle, as established without doubt, by the constitution of Saltash. In discussing the possible objections to the several voters, he proceeds throughout, upon the foundation of their arising from landed property. Thus Major Tucker, if alledged by the opposite party to have *sold his lands*, is to be maintained as duly qualified, because he has made a *new purchase, and bath the deeds*. What has this observation to do with the election, if the right were in freemen? for then it would signify nothing whether he had sold his land or not. This Major Tucker is described as a corporator, for he is in the list of those who are *sworn*; but the town clerk does not suggest the means of supporting his vote on that ground, but from his *new purchase*. In his describing the first list as *sworn* freeburgesses, he gives credit to the distinction which some of the witnesses have made, as if these were contradistinguished from other persons called *freeburgesses* only; a name given to the burgage tenants.

Six are noted to have actually polled, though *not sworn* of the corporation. He does not
suppose

suppose the possibility of an objection's arising on that ground : Yet he is not backward with any that were at all likely ; as appears by his mentioning that of residence, which certainly could raise no legal objection in Saltash.

These observations he makes on the electors on the side of his own friends. In going through those opposed to him, he observes of one who had been polled, though not of the corporation, that his *title* was not good. Not that his vote was bad because no freeman ; but that his *title*, which must mean to his *land*, was defective. He says of another, that he is a good vote, though he can't *shew his old deeds*. These deeds can relate only to his voting in right of his burgage. He too is not of the corporation ; yet the town clerk admits him to be a good vote, though on the opposite side. Two are queried as deriving titles by inheritance, one *as heir* to his father, the other to his aunt. It will not be pretended that a right to vote as a corporator was ever so derived. These queries, probably, were intended for an inquiry into the facts, whether they were such heirs or not. He admits they *may* be good votes ; nor does he think of objecting to these or the others, for not being freemen. The other votes are described as *old faggots* and new ones. This hackney phrase is peculiar to the abuses practised in boroughs,

where the right of voting is derived from land, and is applied to no other.

It is impossible, after reading this paper, to doubt of Hickes's opinion, of an ascertained right of election in the freeholders. Hickes was, from his situation, the best qualified to speak upon the subject; he was familiarly acquainted with the constitution of the borough; he was likewise a native of it, and had always resided in it. In a question of this sort, the practical opinion of such a man ought to have the most decisive weight.

An inference of the same sort is to be made from Mr. Rogers's letter. In considering of the means, by which they might be enabled to defeat the expected scheme of making faggots, on Buller's part, he does not propose to deny the right of freeholders to vote: That does not enter his head; But to oppose him in his own way, by faggots on their side. This happened at a much later period than the date of the town clerk's paper, and shews the prevailing reputation of the right in burgage tenures, in actual practice, so late as 1754.

The counsel for the sitting member answered these observations by the following: They said,

There is something suspicious in the conduct of the petitioners, in bringing forward detached pieces of new evidence, upon every new trial.

trial. It leads to a belief, that there is on that side, a variety of other papers still remaining to be produced, as circumstances may raise hopes of advantage from them; and of others also that are withheld for similar reasons. On the last trial the copy of the poll was produced, from a place that had been searched before for papers relating to this cause*, where it was not then found; and now this paper is brought forward, without any account given of it. It is, no doubt, a desirable object to the party to give his cause the appearance of more strength of evidence, upon every new trial; but the Committee will not be deceived by appearances; they will give effect to the intrinsic weight of the evidence: *Ponderanda sunt testimonia, non numeranda.*

When duly considered, this new evidence does not carry the case further than before; for it does not prove who *voted*, which is the only proper evidence of the right. It is merely a calculation of probabilities; and we are left in the dark, as to the real use it was intended for, or whether it was used at all. We know not now, what scheme of election might then have been in contemplation. It is a sort of brief drawn up for the poll, by an attorney engaged

* See the Minutes of Howell's evidence to the second Committee in 1783.

on a side, and therefore cannot be said to contain an indifferent opinion on the subject. But if his opinion is to be relied upon as it stands, it must be taken throughout; and then it would make *residence* and *payment of rates*, a qualification to the right of voting. This shews that he did not think it a burgage tenure right, as is now contended for. The same conclusion may be drawn from his objecting to some as *faggots*; which have been held not to be objectionable votes, where that right prevails.

It is remarkable, that he places the sworn freeburgesses first upon the list; and accounts them free from all objection, except in the instance of Tucker, which proves too much. His note that some have polled, though not sworn, does not warrant the conclusion drawn from it on the other side; it is an observation of the *fact* only, very consistent with his entertaining a doubt of the *right*. This tallies with the evidence of the election in 1713, when likewise it appears that some got on the poll who were not freemen. Perhaps their numbers might have been so ballanced on each side, that it was not worth while to contest their right. Botters, who is noted as a good vote, though not able to shew his old deeds, was probably of the corporation; for he is said to have done offices. It should be observed, that at the period when this paper
was

was written, it was the practice to produce deeds upon admissions into the corporation; and that easily accounts for the town clerk's observations about deeds: And the expression of *faggots* was applied to those who obtained colourable titles for such admission.

Thus taking the whole of these observations together, they will not be found inconsistent with the right of the sworn freeburgesses; when connected with the next following election in 1727, at which it is proved, from the return*, that none but sworn freemen voted. So that whatever notion might have been entertained of a claim by freeholders in 1722, it appears to have vanished before 1727.

Mr. Rogers's letter is used in order to shew the prevailing opinion of the right of freeholders: But it cannot in just reasoning be made to prove more, than that they were *expected* to make a claim. In fact they did not, and therefore must be taken to have abandoned it. Mr. Rogers's not denying their right, may well be accounted for, by his opinion that they might be outnumbered by those on his side; which method he might think wiser than taking the expensive and uncertain issue of a contest in parliament."

* See hereafter, p. 222.

On the part of the sitting member, the following addition was made, to the evidence offered on the same side at the former trial.

They read that entry in the constitution book, before stated in p. 125, which on the former occasion made part of the evidence produced by the petitioners, but which the same party now omitted to read, relating to land *in fee*.

It was likewise proved, that all those who voted for the *successful* candidates, whose names appear on the copy of the poll in 1713, were corporators; except two, whom the petitioner proved to have been admitted into the corporation *after* that year. This appeared in part by some affidavits sworn in the King's Bench, by members of the corporation in 1720, relating to law suits among them then depending; which were likewise produced, to shew their acting under the charter of Charles II, and were read by the consent of the petitioner's counsel. One of these affidavits was made by John Hickes the town clerk. It stated, that he had been town clerk for ten years: That it appeared by the charter of Charles II. that there were 33 modern freeburgesses: That within 10 years last past, the number had never exceeded 25: That at Her-ring's election for alderman, (about which the dispute then was) there were 24 voters inhabitants

tants of the said borough; whom he named in the affidavit. The counsel for the petitioner said, that 18 of these, appeared by the old book to have *entered their deeds*, or to have been sworn freeburgesses before the charter, and that all but six of them signed the returns of 1714 and 1718, as burgage freeholders.

They read the affidavits likewise of Mathew Veale, Thomas Luskey and Jos. Willyams. The former said that he had been sworn into the corporation 43 years; and the other two that they had been so for 40 years.

The counsel for the petitioner observed, that neither of these three were named in the above charter of Charles II, and that they did not distinguish themselves from the others, in respect of rights and privileges; although they certainly had not been admitted under that charter. They also observed, that of the 29 who signed the return in 1718, only 17 appeared in the list stated in Hickes's affidavit: And that it was probable that many more than 29 voted; since those who voted for the unsuccessful candidate were not likely to sign the return of their opponent. And further, that only 13 of the 36 who signed the return in 1722, were mentioned in the above affidavit.

In the following statement are contrasted, the proofs for the sitting member, tending to establish
the

the fact, that the persons named in the poll of 1713 were corporators, as abovementioned, and the remarks made on the part of the petitioner upon those proofs; the whole being brought into one point of view.

Sitting Member's Proofs. Petitioner's Remarks.

John Ford, sen. By being
Mayor on the return.

John Ford, jun. By being
Justice on the return.

Edward Leane—Named in
the charter.

Was sworn upon entering his
deeds in 1680, before the
charter.

Christ. Hill—Mayor in 1708.

Matthew Veale—By his own
affidavit.

It proves him to have been
so before the charter, and
to have derived no rights
whatever under it.

William Roberts—By having
signed returns from 1702 to
1713.

That is *all* the proof about
him.

Nich. Stephens—Sworn in
1699.

Upon entering his deeds.

Peter Mill—Signed returns
from 1708 to 1710 inclu-
sive.

That is *all* the proof.

Joseph Williams—By his own
affidavit.

(*As above of Matthew Veale*)

Owen Teage—Named in the
charter.

Sworn before it, upon enter-
ing his deed in 1679.

Francis Pollard—Sworn in
1698.

Upon entering his deeds.

John

SALTASH, 1787. 221

Sitting Member's Proofs.	Petitioner's Remarks,
John Hickes—Signed the return in 1714 as Mayor.	Sworn upon entering his deed.
Nathaniel Sweetnam—Sworn in 1712.	Upon entering his deed.
Thomas Lufkey—By his own affidavit.	(<i>As above of Matthew Feale</i>)
George Lobb—Signed returns from 1700 to 1710.	That is <i>all</i> the proof.
William Parnell—By his own affidavit.	Made in 1720, and only states that he had been of the corporation <i>many</i> years; not naming how many.
John Preston—Named in the charter.	He had a previous title.
Henry Preston—By his own affidavit in 1720, that he had been sworn 20 years.	He signed returns in 1681 and after; therefore long before he was sworn.
Benedict Crust—Sworn before 1713.	Upon entering his deed.
Stephen Williams—Ditto.	Ditto.
Richard Gawde—Ditto.	Ditto.
William Bastard—Named in the charter.	Signed the return of 1714 as a burgage tenant.
Thomas Williams—Signed returns from 1691 to 1714.	That is <i>all</i> the proof.
John Davyes—By Hickes's affidavit,	It only proves him to have been <i>then</i> a corporator, i. e. in 1720.
Joseph Hunkin—Signed returns from 1691 to 1710.	That is <i>all</i> the proof.
	So that as to seven of the above number, viz. Roberts, Mills, Parnell, Thomas Williams, Davye and Hunkin,

Sitting Member's Proofs.

Petitioner's Remarks.

Hunkin, the proof is very inconclusive: And as to the remaining six, viz.

Richard Herring, he was sworn in 1715,

Edward Leane, *junior*, in 1714,

Lark and Pyper,—the sitting member offered no proof at all about them.

Mr. Porter was sworn in 1714, and

Benjamin Wadge in 1715.

The return of 1727 (which was the next after that of 1722-23) was produced, in order to shew the names subscribed to it; all of whom, the counsel for the sitting member offered to prove, to have been then members of the corporation. On the part of the petitioner this was admitted.

It was likewise admitted on the same side, that there were no entries in the constitution book, relative to the producing deeds and admission of freeburgeffes, before 1675.

Mr. Colton the mayor of Saltaſh, was examined for the sitting member. He said he had lived in the town about 25 years, and had never heard of the right of freeholders to vote till about 1780; or at least not till after 1772; nor any doubt suggested by old people concerning the right of the corporation to elect. This witness, in his account
of

of the election proceedings in 1772, and some transactions in the corporation subsequent to it, and other matters not immediately relating to the present question, contradicted Mr. Gaborian the witness mentioned in p. 141. Mr. Colton was possessed of a burgage house in the town, which he bought before the year 1772, without then knowing it to be a burgage house. He said, that at the election in 1783, where he acted as returning officer, Mr. Gaborian voted as a corporator, and disclaimed his right as a burgage freeholder, upon a question's being put to him for the purpose.

Mr. H. Hickes, upwards of 70 years old, an alderman of Saltash, which place he had held more than 40 years, spoke to the same purpose as to the right of the corporation; but he had heard the right of the freeholders to vote, spoken of as an old claim, before 1780. His father was the town clerk, mentioned in p. 208; but the witness did not remember ever to have heard him speak particularly of the right of election, nor any other old person now dead. He remembered when it was the practice to admit no members of the corporation, without seeing the title deeds of their houses; and when colourable titles used to be made out, for the purpose of getting people admitted. He said the corporation had always acted under the charter of Charles II.

before

before that of the present king was granted. He also contradicted a part of Mr. Gaborian's evidence (who was his brother-in-law) relating to his conduct before mentioned in the election of an alderman.

Another witness was also called to contradict an assertion of Mr. Gaborian upon the same subject; and afterwards persons of rank and respect were called on the petitioner's side, in support of his honour and credit. The subject of these examinations was indifferent to the questions of the cause; on which account, I avoid a particular recital of them.

Towards the close of the petitioner's evidence, his counsel were required by the other side, to prove the titles of the several persons, who tendered their votes for him. The deeds were accordingly produced, and the sitting member's counsel required evidence to prove the property described in them, to be antient burgages, according to the descriptions in the deeds. This was accordingly done with respect to four: And then, after some little dispute, they admitted (as was done before the last Committee) that more than nine persons (the number of the sitting member's votes) intitled to burgage houses, had tendered their votes for the petitioner. Only 16 or 17 of the whole number live in Saltash.

On the part of the petitioner, the counsel did not seem to me, to argue so pointedly against the fact

fact of the acceptance of Charles II's charter as they did before (G). They were also more explicit on the subject of the antiquity of the corporation; expressly admitting it to have existed long before members of parliament were sent from this town; and contending that this question was quite immaterial, as they denied that the corporation, *as such*, had a right to elect representatives.

On the part of the sitting member all the arguments used on the former trial, upon the effect of the preceding decisions, were again repeated and strenuously urged (F).

On Saturday, May 5, after the counsel had concluded, the Committee determined

That the petitioner was duly elected, and ought to have been returned; of which the House was informed by the chairman on Monday, May 7*.

In the course of the above trial, two of the members were taken ill and unable to attend; Mr. Kynaston May 2, and Mr. Pye May 3. The chairman was informed of it by a letter from each of these gentlemen; and upon his motion in the House, their attendance on the Committee was dispensed with. Neither of them attended afterwards (H).

* See Votes, p. 565-6.

N O T E S

ON THE CASE OF

S A L T A S H.

PAGE 131. (A.) The stile of the royal charters, conferring upon boroughs the privilege of sending members to parliament, or (as it was expressed in the earlier period) requiring their attendance there, shews, that this power of the crown was exercised as of course and without dispute. In the reign of Jas. I. as has been seen in the passage cited from Serjeant Glanville, in p. 172, the commons began to oppose the unlimited exercise of this prerogative, and denied the king's power to change or restrain the right and manner of election. After the restoration, the royal power of granting to a borough the right of representation in parliament, was denied absolutely by some members in the House of Commons; and the question produced a considerable debate, which ended in favour of the prerogative by a large majority. This happened in the case of Newark, an account of which is given in 1 Doug. elect. 68, &c. It appears from Grey's debates, vol. iv. p. 297, that Serjeant Crooke and Serjeant Maynard spoke in favour of the crown in this case. But in the reign of Elizabeth, and less than a century before, the House of Commons seems

to have been very indifferent about the increase of representatives, and of parliamentary boroughs; and rather anxious to preserve the rights of the crown respecting them, than willing to oppose them. In 1571 (1 Journ. 83.) they appointed a committee, "to confer with the *Attorney* and *Solicitor General*, about the return of burgesses" for eight boroughs, which had then returned members for the first time. Three days after (ib.) the house receives a "report of the validity of the burgesses; and ordered, by *Mr. Attorney's assent*, that the burgesses shall remain according to the returns; for that the validity of the charters of their towns is *elsewhere* to be examined, if cause be." See Glanv. 94. The house in this case, seems to have acted upon a notion, that the crown was interested to oppose the claims of the boroughs; and justly considered an addition to their own number, as so much gained in the political scale, on the side of the people. In the same manner, the addition of members from the Universities, in the beginning of king James's reign, was an act of state, so far from raising any doubt against the prerogative, that it gave general satisfaction.

But however the legal power of the prerogative may have been thought to be established in the case of Newark, on the part of the crown it was thought dangerous, to venture upon a second attempt to maintain the exercise of it, against the principles then prevailing in the nation. And from that time, though the theory of the right might have been upheld, it was relinquished in fact: Nor did the ministers of Chas. II. recur to it afterwards, when in the full execution of their scheme upon corporations, at the end of his

reign, and when the power of the crown was highest. It may be said indeed, that the means they did take, were fully equal to their ends: And this may be thought a sufficient reason for their not pursuing any other.

West, in his inquiry into the manner of creating peers, written in 1719, in support of the Peerage bill then depending, says *, "——and now the commons (just as the lords did with relation to peerages, while the barons were feudal) begin openly to dispute the power of creating burroughs; and I believe every reader will agree, that if a burrough was now to be erected, its members would find it pretty hard to gain admission into the House of Commons." It is plain, he supposes the case of an addition to the number of members; and that (in his opinion at least) this prerogative had not been *established* by the case of Newark.

Mr. Douglas observes upon that determination, and the prevailing opinion of that day, that "since the Union, a different opinion has prevailed; it being now understood, that the king cannot bestow a *new* right of sending members to parliament; because it would alter the mutual proportion of English and Scotch members established in the act of Union;" upon the principles of which, the commissioners on each side acceded to the treaty.

It is not impossible that this question may arise within a short compass of time; at least, there will be materials for it; but without interfering with the principles of the Union.

* P. 73.

The members for the town of Helston, represent a corporation, that is tending fast to its entire dissolution; having been long incapable of continuing itself, and consisting at present of two or three persons only, upon whose death it will be extinct *. His present majesty erected a new corporation in the town, in the year 1774, and named the remaining members of the old corporation, who were then nine in number, as part of it; but a great majority of them refused to accept it, and adhered to their old privilege; by virtue of which they chose the members in the election of that year, and in those which have happened since; in which a select committee has repeatedly confirmed them.

If upon the future extinguishment of the old corporation, the members of the new one should elect the members of parliament for Helston, the crown in this case will have granted a *new* right of sending members to parliament; for there is no more mutual relation between the two sets of constituents, than between the corporations of two different towns. They have the same names, it is true, and are described of the same town; but the new corporation has no representative quality. The parliamentary privilege, whatever it is, is possessed solely by the ancient corporators: And it will be a matter of curious inquiry, to find the means of communicating it, upon their decease, to a new set of persons who had it not before.

In the beginning of representation, it was the *town* that was represented, and not the *corporation* of the

* This note was written in 1786, before the Helston cause, now depending in the court of King's Bench, was instituted.

town. Where a corporation sent the members, it was in right of their lordship of the town. But we have long lost sight of this principle; and consider the corporations, in places where they elect, as the body represented.

If the decision of the House of Commons, in the Newark case, should be considered to have established this prerogative of the crown, the principles of the Union will not stand in its way in the case of Helston. And I know of no case, the circumstances of which have been so defined, and open to the question of right, if it should be thought proper or necessary, in a constitutional view, to introduce it. In the cases of Banbury, Tiverton, Maidstone, Colchester, and others, the new charters were sooner or later accepted by the old corporations, and therefore made no *new* incorporation, and created no *new* representation. In that of Caermarthen, the dissenting members of the old corporation, had been inconsistent in their conduct; and the real effective question, in that election in which they endeavoured to avail themselves of their old charter, seems to have been, whether they had not accepted or acquiesced under the new one; a question of fact, which, in the determination of the house, was decided against them, as a fact; and in this manner the matter of law was excluded from it. (See 32 Journ. 763) So that in this case also, the new charter was considered to have been accepted by the members of the old body corporate.

The circumstances of the Bewdley case, in 1708, were at one time exactly such as those of Helston are at present. The question of prerogative right, in the creation of new representatives, under a new charter,
does

does not seem to have occurred, in any part of the litigation which this charter produced, in the House of Commons, or in the King's Bench. For the commons, by a forced and unjust construction of law, considered the old and new corporations as *one* body; and that the former was bound to submit to the new charter: Which in their first determination they established, with the rights of the members elected under it. If this judgment could have been considered, at that time, as an admission of the abovementioned legal right in the crown, yet as it was rescinded two years after, no such argument can be drawn from it now: For after the next following election, a judgment directly contrary passed. The house voted the new charter to be illegal and void; addressed the queen to take proper measures for repealing it; and upon the trial of the *Scire facias*, a verdict was found against it*. This verdict, however, was not satisfactory to the court, who directed a new trial of the cause, upon which there was a special verdict found; and here the matter rested. The parties afterwards seem to have made up their differences, and acquiesced under the new charter; by virtue of which the member for Bewdley has been ever since elected. Therefore in a parliamentary view, this new charter likewise has only continued the old body corporate, and its representation, without creating a *new* one.

According to the manner in which our kings exercised this prerogative, before the restoration, the House of Commons seems to have been as subject to

* See 16 Journ. 11, 97, 408, 438, 9. 18 Journ. 32, 135. and 1 Peere Will. 207, &c.

alteration by the crown, as the house of peers : Boroughs being added to, and sometimes even omitted from the representative body, at pleasure. In times more remote, we find the peers also, as well as the boroughs, summoned or omitted arbitrarily ; though I believe the omission of peers, happened only in times of violence. But in modern times, and particularly within the happy century (now almost accomplished) of public liberty, since the revolution, our constitution has been more regularly administered ; and the several orders of the state have supported their respective privileges, with more regard to each other, and to the constitution. Within this period, the royal prerogative has been limited, in each of the other legislative bodies, according to those rules upon which both have founded their own privileges, and of which each of them claims to be the supreme and sole judge. These privileges may be called *their* prerogative ; and in them consists their independency. Thus the lords have thought themselves competent to judge of the creation of a peerage ; and in the cases of the dukes of Dover and Brandon, excluded from their house, peers regularly made by the crown. This judgment was absolute upon the question ; and the late admission of the Brandon peerage, did not pass upon a notion of the *incompetency* of the house to decide against it. Just so in the Newark case, in the House of Commons, all those who argued, seemed to admit the right and competency of the commons, to *judge* of the exercise of the royal prerogative in such instances.

Considering it as a question of prerogative simply, the power of creating parliamentary boroughs, seems to have implied a power of exempting others ; which,

in

in fact, has been frequently exerted formerly. Therefore, without recurring to the useful principles of the Union, it seems reasonable to have some check upon this power; which, if possessed by any, must be by the Commons.

But there is one mode of altering the number of representatives, in which the king would take no part: As, suppose a corporation having right of representation, altogether extinct, by the death of every member, and no renewing charter; as might have been the case of Helston and other places,—what is to be done? The proportion fixed in the Union would be broken without any man's default.

P. 152. (B.) This circumstance requires explanation; for, as *tenant for life*, Mr. Buller could certainly have granted freehold estates. It was not explained in the course of the cause, but I have heard the following account of it since. At this time one Hickes, the steward of the family, was gained over by the opposite party; and, to Mr. Buller's surprise, when at the poll, objected to the votes offered to be brought up on his side; telling him, that as tenant for life, he could not legally make them. Whether Mr. Buller was ignorant of his power, and imposed on by his steward; or whether the parties conceived that the qualification of freeholders, conformably to the by-law stated in p. 125, required an estate *in fee*, is not now to be known. But the notion of Mr. Buller's disability is said to have been credited in the family, and to have directed their conduct with respect to this borough.

From

From the following list of the members for this town, from the first return, it appears probable that the Buller family used to have a considerable influence in the elections there.

List of the Members for Saltash, from the first return extant, to the year 1750.

1552. 6 Edw. VI.	George Kestwicke—Edward Saunders.
1583. 26 Eliz.	Richard Carew, Esq;—Wm. Clark.
1661. 13 Cha. II.	Francis Buller—John Butler.
1679. 31 Cha. II.	John Davie, Bart.—William Jennens, Esq;
1681. 33 Cha. II.	Hon. Barnard Grenville, Esq; John Davy, Bart.
1685. 1 James II.	Cecil Weeke, Knt.—Edmond Walter, Esq;
1688. Convent. Parl.	Hon. Barnard Grenville, Esq; John Wardon.
1689. 1 Wm. & Mary.	John Carew, Bart.—Richard Carew, Esq;
1691. 3 Wm. & Mary.	Narcisso Luttrell, Esq;
1692. 4 Wm. & Mary.	Michael Hill, Esq; *
1695. 7 Wm. III.	Fran. Buller—Walter Moyle
1698. 10 Wm. III.	James Buller, Esq;
10 Wm. III.	John Speccott, Esq;—John Morice, Esq;
1700. 12 Wm. III.	James Buller, Esq;—Alexander Pendarves, Esq;

* This was the name of the father of Trevor Hill, mentioned in p. 133; and, most probably, the same person.

1700. 12 Wm. III. Thomas Carew, Esq;
 1701. 13 Wm. III. James Buller, Esq;—Thomas
 Carew, Esq;
 1702. 1 Anne. John Rolle, Esq;
 1 Anne. Thomas Carew, Esq;—Ben-
 jamin Buller, Esq;
 1705. 4 Anne. James Buller, Esq;—Joseph
 Moyle, Esq;
 *1708. 7 Anne. James Buller, Esq;—Alex-
 ander Pendarves, Esq;
 7 Anne. Cholmeley Dering, Bart.
 1710. 9 Anne. William Carew of Antoney,
 Bart.
 9 Anne. Cholmeley Dering, Bart.—
 Charles Pendarves, Esq;
 9 Anne. Jonathan Elford, Esq;
 1713. 12 Anne. Wm. Shippen, Esq;—Jona-
 than Elford, Esq;
 1714. 1 Geo. I. Wm. Shippen, Esq;—Shil-
 ston Calmady, Esq;
 1718. 5 Geo. I. John Francis Buller, Esq;
 1722. 8 Geo. I. Thomas Swanton—Edward
 Hughes, Esqrs.
 1723. 9 Geo. I. Philip Loyd, Esq;
 1727. 1 Geo. II. Lord Glenorchy—Edward
 Hughes, Esq;
 1734. 7 Geo. II. Lord Glenorchy—Thomas
 Corbett, Esq;
 1741. 14 Geo. II. Thos. Corbett—John Cleve-
 land, Esqrs.
 1743. 16 Geo. II. Stamp Brooksbank, Esq;
 1747.

1747. 21 Geo. II. Hon. Edward Boscawen—
 Thomas Corbett, Esq;
 21 Geo. II. Stamp Brooksbank, Esq;
 1750. 24 Geo. II. Geo. Bridges Rodney, Esq;

P. 179, 180. (C.) Rolle, in his abridgment, tit. *Corporation F.* says, "If the king grants lands to the men, or inhabitants of D, and their heirs and successors, rendering rent, this establishes them as a corporation *with respect to this land*, but to no other purpose." He cites for his authority 21 Edw. IV. 56, a case in which the point seems only to have been laid down *arguendo*, and makes no part of the determination. Rolle also relies upon the same case, for the position, that such grant as before mentioned would be void, *if no rent were reserved to the crown*. This position, like the former, is only the argument of counsel. But in that case, fol. 59, one of the Judges says, that if the king grant to the men of I. to be discharged of toll, it makes them a corporation *for this purpose*, but does not give them a capacity to purchase. In 7 Edw. IV. 14, a. it was held in C. B. that if the king give land in fee farm *probis hominibus villæ de D.* the incorporation is good; and so it is where it is given *burgensibus, civibus & communitati*; and they, by such names of corporation, may have actions of things concerning their farm, &c. And the writ shall be "*reddendum hominibus villæ de D.*" vel "*civibus, &c.*" Coke, in the case of Sutton's hospital, 10 Rep. 27, recites a case in which it was determined in 2 Hen. VII. Fitz. abr. tit. *Grant.* 36. That a grant of Henry IV. licensing the foundation of a Chantry, by

by the words "habendum & tenendum redditum prædictum eidem Capellano & successoribus suis," made a sufficient incorporation and perpetual succession, for the chaplains of the Chauntry. The reader may receive further instruction on this subject, by referring to Mr. Douglas's observations upon it, in his second volume, p. 296, *note E*.

If those requisites which Lord Coke, in the above case, lays down as essential to the creation of bodies corporate, were carried back to the times of the ancient incorporations, in order to try the validity of their charters or institutions by them, there are few that would hold the examination. These essential points are, 1st. A lawful authority of incorporation, viz. by the common law, by statute, by charter, or by prescription: 2d. Proper persons to be incorporated: 3d. A proper name by which they are incorporated: 4th. A place to be described of: 5th. Sufficient legal words of incorporation.

Of the favouring principle of the law on this subject, there is a remarkable instance in Serjeant Glanville's report of the Chippenham case, in the following words, stated by him as the opinion of the Committee—"Rather than the right of such boroughs, wherein the commonwealth hath interest, should be void or destroyed, for the want of being corporate, they should and ought to be taken for lawful corporations, to *this particular purpose*; though to other purposes of taking and making grants of lands or goods, or the like, they are no corporation."

P. 182. (D.) Du Cange, in his Glossary, under the words *Communia* & *Communantia*, says, "Inter Com-

muniæ

muniz jura præcipua recensentur *Scabinatus, Collegium, Majoratus, Sigillum, Campana, Berfredus, & Jurisdic-tio*—De *Sigillo* hæc habentur in chartâ S. Ludovici regis anno 1235 pro Episcopo Remensi; dicebat enim, *quod non debebant* (Cives Remenses) *habere Sigillum, cum non habeant Communiam.*” If with us in England, a common seal were a proof of incorporation, it would raise many societies to a station they do not aspire to. The several law societies of the inns of court, are known not to be regular corporations*; yet they have always used a common seal in their public acts: And there are many other instances, in which common seals are used by bodies not corporate. But the case of a corporation without a common seal, seems extraordinary: However, such a case is said to have existed. The attorney general, in his argument upon the *Quo-warranto* against the city of London, in 1683, having occasion to refer to the case of Cambridge in 5^o Ric. 2. states it thus: “The burgesses who appeared on behalf of the commonalty, before the king and lords, were asked if they had authority under the common seal of the town? They answer, the town had no common seal; but that they were chosen at a common assembly of the town, summoned for the purpose, &c.”

P. 202. (E.) I have placed the two cases of Lyme and Saltaish together, on account of the great resemblance they bear to each other. The history and present state of these boroughs exhibit to our view, in different stages, the progress of corporations (the new race

* Sty. 457. Skin. 684.

in representation) in supplanting the antient feudal constituents and rulers of towns. I have endeavoured to shew, in a note in my first volume*, in what manner, according to the original feudal state of boroughs in this country, their inhabitants obtained their privileges, in the first degree, by enfranchisement; and, in the second, by incorporation: Both being derived, under the feudal system, from their tenures. In the beginning, as well as after the corporate rights had been established, the immunity and the tenure were united in the same persons; the former, instead of raising the person bearing it, to an independent character, being considered only as a secondary quality of the burghers, or borough tenant. When their numbers, or their trade, had enabled them to establish, or to obtain grants of guilds or fraternities, for the purposes of trade, then began the practice of admitting members for these purposes, who were either strangers to the borough, or unconnected with its tenure, or feudal relations.

These guilds often began by voluntary association; and having strengthened into right by length of time, gave beginning to many of those corporations, which, at this day, found their titles in prescription. Royal charters were afterwards obtained, containing additional privileges, or confirming antient customs. Many of these institutions likewise commenced by the authority of charters from the sovereign. Of this sort, I conceive the charter of Edw. I. to the town of Lyme to have been; which has no expressions of reference to former usage, or to the times of ancestors, as is very often the case in these charters;

* Vol. I. p. 98.

instances of which may be seen, in the charter of *Valle tortâ*, and in one of an earlier period, granted to Pontefract, mentioned in p. 18, of Vol. I. The freedom of the borough was enjoyed by all the members of the guild; but the government of it belonged to the burghers only, or those who held the lands and tenements. The earliest records of Lyme shew plainly, how much more respected the burgage-tenant-freeman was, than a mere freeman or guild-brother: They had the precedence in all corporation acts, were distinguished by a particular name, and sometimes called *burgesses* *καὶ ἱερόχρησται*. But by the gradual increase of the wealth and numbers of the guild-freemen, and by the undistinguishing use of the corporate name and authority, in all the proceedings of the borough; by the equality of all the members at public meetings, and by the decline of the feudal tenures, the reason for preserving a distinction of persons declined too. All the advantages and authority of the borough, being exercised in the guildhall, were in time supposed to belong to its members only, and thus all privileges gradually became vested in the members of the corporation.

While the concerns of a borough were confined to its own inhabitants, and before the greater interests of government had penetrated among them, so as to give political importance to their elections, they bestowed freely, and for a small consideration, their corporate or guild privileges, upon all who applied for them; for then they could be useful only to those, who by exercising them, could in their turn be useful to the town. And it is natural to believe, that the land or burgage holders, were admitted as of course among
their

their number. But when long usage had established the corporate authority of the guild, as the ruling authority of the borough, every public act of the borough was transacted in the name of the corporation. It became a matter of discretion in the members, to admit whom they pleased, to partake of their privileges; and when new political principles took place among them, they exercised this discretion with some distinction and reserve. It was now too late for the holders of the antient burgages to *demand* their antient privilege; because, by long acquiescence, they had acknowledged and submitted to a different institution, and, perhaps, had lost the evidence of, their former establishment.

I have said above, that guilds or fraternities often began by voluntary association. The *fact*, I know, is contrary to a maxim of our modern law, but is well warranted by the history of this country, and of other nations of Europe, in the 11th, 12th, 13th, and 14th centuries. We now understand the word *guild* to have a corporate sense; and Lord Coke lays it down with authority, (10 Rep. 30) that of old-time, the burgesses of a town or borough were *incorporated* when the king granted them *gildam mercatoriam*; which expression, Rolle, in his abridgment*, adopts as one mode of conferring a royal incorporation. But it appears from Du Cange's glossary on this word, that in the beginning it had no such sense. *Gilda*, or *Ghilda*, is there defined *Fraternitas*, *Sodalitium*, *Con-tubernium*, *Curia*, *Societas*, *Collegium*. The author cites the following passage from S. Anselmus, lib. 2,

* 1 Abr. 513. Corporation F.

epist. 7. "De domino Henrico qui Camerarius fuit, audio, quia in multis inordinatè se-geffit & maximè in bibendo, ita ut in *gildas* cum ebriosis bibat & cum eis inebrietur—prohibeo ne amplius in *gildâ* aut in conventu eorum qui ad inebriandum solum conveniunt, bibere audeat." Here the word is used for club, or society. In the same author, *Guildballa* is defined, "locus in quo exponuntur merces nundinariæ." He also * cites from a charter of an Earl of Flanders, in 1211, these words: "Omnes qui ghildam habent & ad illam pertinent, & infra cingulum villæ suæ manent, *liberos* omnes facio," where burgeses are mentioned as having a *guild*, previous to their acquiring enfranchisement.

A modern French author, (M. *Houard*) intimately acquainted with the laws of the middle ages, who has published in France, the antient laws of this island under the Saxon and Norman princes, and the writings of our first lawyers, as an illustration of the laws of France, considers the *Friborga* among the Saxons, and *Franc-plege* among the Normans (*Vicinia* and *Gyltonia*), as synonymous with *Gilda*. These are well known to mean societies of persons and families in towns or hamlets, for mutual convenience and protection, who were answerable to the king or lord, for the good behaviour of all the individual members. In the 75th chapter of the laws of Henry I. these persons are called *Congildones*. M. *Houard* says of them, "Ces Sociétés ne s'établirent d'abord, qu'entre quelques familles de laboureurs; *eorum olla simul bulliabant* (Wilkins *Glossar*.) ensuite entre des marchands:

* Du Cange Supplement.

Enfin tous les habitans de chaque bourg firent en commun leur commerce ; de là leurs habitations voisines les unes des autres ; les taxes que le Souverain ou les seigneurs lui imposèrent, sous le nom de *gylde* au *gelde*, par compensation des privilèges qu'ils leurs accordèrent ; & dont l'affranchissement du vasselage ou de l'esclavage, c'est à dire, la *bourgeoisie* fut le principal *."

This observation is made by the author, upon the following passage in our antient Glanville † : " Si quis *Nativus* quieté per unum annum & unum diem, in aliquâ *villâ privilegiatâ* manserit, ita quod in, eorum *communem gyldam* tanquam civis receptus fuerit, eo ipso a villenagio liberabitur." It will hardly be imagined, that Glanville, writing this in the reign of Henry II. can be supposed to describe every enfranchised town or vill, as a body corporate, as we now understand the term.

In the statute 32 Henry VIII. c. 42, for uniting the companies of Barbers and Surgeons, one of these bodies is described as a *company* having *freemen*, but not to be incorporate. The words are, " For as much as within the said city, there be now two several and distinct companies of Surgeons, the one company being called the Barbers of London, and the other company called the Surgeons of London, which company of Barbers be incorporated to sue and to be sued, &c. by letters patent; and the other company called the Surgeons be not incorporate, nor have any manner of incorporation." The act proceeds to unite the *freemen* of both companies into one body.

* Houard, Traité sur les Cout. Anglo-Norm. vol. I. p. 444.

† Tract. de Legibus, lib. 5. c. 5.

In a case in the year book, 49 Edw. III. fol. 3, an *established* guild or fraternity of tradesmen in London, is spoken of as having commenced by voluntary association; and it was not pretended by their counsel, that they derived the privilege from charter or prescriptive right: But the latter endeavoured to maintain their right as a body corporate, by the custom of London, which, he said, allowed of *voluntary* corporations. The words of the counsel for the crown are, "Cest Fraternité & tous tiels, ne sont my perpetuels, mes comencent per l'assent de gents d'un art de leur frank volonté; issint, mesque un de la fraternity voile relinquere la fraternity, il poet bien quant lui pleast. Mes cestuy que est un de la Comminalty de Londres est perpetuellement un de la Commenalty, per ceo que la City est perpetuel." One of the judges hereupon observed, that *fraternity* was not a term of the law. Unluckily for the guild, in this case, they were disputing with the *Crown*, for an estate devised to them; and the question was, whether they had capacity to take lands &c; for, as to other purposes, the counsel for the crown did not deny the lawfulness of their institution. The case was decided, as questions of forfeiture in former days commonly were.

This is the earliest case I have met with, establishing the maxim, that the king alone can incorporate; and is referred to by Lord Coke, Rolle and Hale, as laying the foundation of that doctrine.

Madox, in a note in p. 24 of his *Firma Burgi*, recites a charter of Richard II. to a fraternity in Norwich, in these words: "Sciatis quod cum, ut accepimus, quædam *fraternitas & gilda* gloriosi Martiris Sancti Georgii in civitate nostrâ Norwici, per 30 annos elapsos

elâpſos & amplius, continuè bene & honeſtè gubernatæ fuerint & ad huc exiſtant—Nos Fraternitatem & Gildam prædictas pro nobis & hæredibus noſtris *acceptamus* ratificamus & confirmamus. Ac conceſſimus quod—ſint perpetuæ & Communitas perpetua, &c.”

P. 225. (F.) In the ſpeeches of the counſel, no mention was made on either ſide of the action previously brought againſt the mayor, as returning officer, for reſuſing the vote of one of the burgage freeholders at the laſt election. The event of it was indifferent to the queſtion before the Committee; but an account of it may be uſeful in the hiſtory of Saltaſh.

The action was brought by a Mr. Drewe, who tendered his vote as a freeholder for Major Lemon. The declaration ſtated the plaintiff's right as a freeholder of a burgage tenement in the borough, and that the defendant knowing, &c. and wrongfully intending to deprive him, &c. reſuſed his vote. The defendant pleaded the general iſſue, and the cauſe came on to be tried by a ſpecial jury, before Mr. Juſtice Wilſon, at the laſt Lent aſſizes for Cornwall, held at Launceſton, March 27, 1787. Mr. Serjeant Lawrence, counſel for the plaintiff, ſtated the caſe at length to the jury, to ſhew the hiſtory and conſtitution of the borough, deducing from thence the plaintiff's right to vote; but declared that he did not mean to charge the defendant with any thing *malicious* in his reſuſal of the vote, only for the *reſuſal*. Hereupon, as ſoon as he ſate down, the counſel for the defendant, in ſtudied arguments, objected to the competency of the plaintiff's proceeding with his evidence, upon the ground of the admiſſion on his part, that

the defendant had done nothing wilfully wrong; al-
leging, (as the plaintiff's counsel admitted) that he
had acted conformably to the usage of the last 30
years, and to three concurring decisions of the elec-
tion committees; and contending, that the foundation
of this action, and of all others against officers of the
law in the execution of their duty, was a *wilful* and
malicious misfeasance.

The learned Judge, at first, inclined to let the plain-
tiff proceed with his evidence; saying, there were
two questions for the jury to consider; first, Whether
the plaintiff had a right to vote; and, secondly, Whe-
ther the defendant had acted maliciously in refusing
the vote; and that it might be necessary to go through
the whole case, in order to ascertain these points.
But after a full hearing of all the counsel on both
sides, his lordship was of opinion, that he ought to
direct a verdict to be taken for the defendant, or the
plaintiff to be non-suited, without proceeding further.
He said, the stat. 7 and 8 Will. III. c. 7, which was
made to prevent false returns, and gives an action to
the party grieved, does not allow it to the candidate
himself, unless the return be *wilfully false*; and it
would be very inconsistent to suppose, when the party
who is the most interested in the act, and most injured
by it, cannot recover damages, except it be wilful;
that one much less aggrieved, and who has less interest
in the same transaction, should yet be more favoured
in the recovery of damages.

His lordship mentioned the case of General Bur-
goyne against Moss the mayor of Preston, which he
stated thus. Sir Henry Hoghton and General Bur-
goyne were candidates for Preston, at the election
in

in 1768, upon a right of voting which had not been exercised at the late elections within memory; and the mayor returned the members chosen in opposition to them, according to that constitution which had prevailed in modern times. Upon a petition to the house, Sir Henry Hoghton and General Burgoyne were determined to be duly elected, and the right of voting, which they contended for, was established by the same decision. Afterwards, General Burgoyne brought an action against the mayor for this false return: Upon the trial of which, it appeared that the mayor (who had acted by Mr. Dunning's advice upon that election) had conducted himself in the same manner as his predecessors had done; and that the class of voters, then supported by the resolution of the House, had never been received at any former election. Lord Bathurst, who tried the cause, upon this evidence directed the jury to find for the defendant, if they should think, that in the execution of his duty, he had acted according to the best of his judgment, and not maliciously: And they gave a verdict for the defendant, to the satisfaction of the court.

Mr. Justice Wilson also observed, that Lord Chief Justice Holt, in the report of the case of Ashby and White, in the King's Bench, endeavours to establish a different opinion, viz. That an action lies, *generally*, for the mere obstruction of the right; but that the decision of the House of Lords upon that case, was founded on a different principle, viz. the wilfulness of the act; and that the same principle was enforced in the justification which the House of Lords published of their conduct; which, it was supposed, was drawn up by the Chief Justice himself. He said,

that Holt stood single in this particular opinion ; but, however, as the plaintiff was earnest in desiring a special verdict, he would, in compliance to the authority of so great a name, direct the question to be put upon the record in that form, in order to have it solemnly argued and determined, if the leading counsel for the plaintiff would declare his own assent to this opinion of Lord Holt.

This mode of settling the cause was declined, and hereupon the plaintiff was non-suited. No step was afterwards taken, in the course of the following term, to renew the question, by moving to set aside the nonsuit. In the mean time, the Committee met for the trial of the present petition, and sat upon it during the first part of Easter term, 1787.

An action of the same sort, in which the declaration was the same, was brought against the mayor of Hastings, after the last general election, and the plaintiff had a verdict for 200*l.* damages. There the defendant's malice made part of the plaintiff's case. The action being brought in the court of Common-Pleas, and judgment signed there for the plaintiff, a writ of error was brought into the court of King's Bench ; which was appointed for argument there in Easter term, 1786. But, upon its coming on, the court prevented the counsel for the plaintiff, in error from discussing their objections to the action, by telling them, that the case of *Ashby and White*, in the House of Lords, was in point, and so conclusive upon the subject, that it would be in vain to agitate the question. The name of this cause was *Sargent and Millward*.

P. 225 and 160. (G.) There was a doubt intimated at the bar, whether the charter of his present majesty, contained the same clause as that of Charles the Second, empowering the king *at pleasure*, to remove the mayor or any of the aldermen, from their offices; it being asserted on one side, that this clause was in the charter, and on the other, that it was not. I was not willing to believe, that a power, originating in the wicked designs of a Stuart prince, against the liberties of this nation, when the garbling of corporations began, would have been suffered to continue under a prince of the House of Hanover. To satisfy my curiosity on this point, I read the original charter through, and had the satisfaction to find the garbling clause of Chas. II'd's charter, omitted in that of his present majesty.

It is as follows in the charter of Chas. II. as I translate it.

“ Provided always & we do hereby reserve to us our heirs and successors full power & authority to amove respectively from their several offices, by letters under the sign manual and signet of us our heirs and successors, any Mayor Recorder Alderman & Town Clerk of the said Boro' for the time being, or any of them, at the will & pleasure of us our heirs & successors, & to declare him or them amoved from his or their said offices. And as often as we our heirs & successors by any such Letters under the sign manual & signet of us our heirs & successors, shall declare such Mayor Recorder Alderman & Town Clerk of the said Boro' for the time being, or any of them, to be amoved from his or their said respective offices, that then & from that time such Mayor Recorder Alderman

man & Town Clerk so amoved or declared to be amoved from his or their respective offices shall *ipso facto* without any further proceeding be really & to all intents & purposes amoved; & this as often as it shall so happen; any thing in these presents contained to the contrary notwithstanding. And then in such case from time to time, as often as the case shall so happen, within a convenient time after such amovement or amovements, some other person or persons may & shall be elected appointed & sworn into the place or places, office or offices, of him or them so amoved, by the Mayor Aldermen and freeburgesses of the said Borough for the time being, or the major part of them who shall remain within the said Borough, in the form before in these presents mentioned."

There is, however, in the charter of his present majesty, a clause respecting the mayor, in these words: "Which said Mayor, as well present as future, for any neglect or default, or any other reasonable cause, we will shall be amoveable by us our heirs or successors." This clause is transcribed from a similar one in the charter of Chas. II. but softened by the omission of the *ad bene-placitum*, which the former charter bears.

The above clause became the subject of debate in the House of Commons, in the session next after the grant of the charter. On the 3d of April 1775, the present Earl of Radnor (then Lord Folkestone) moved, "That the reservation contained in the said charter, and expressed in these words, (*stating them*) is unconstitutional, as it tends to restrain the freedom of elections, and of returns of members to serve in parliament for the said borough; and establishes a precedent

dent dangerous to the commons of Great Britain, and to the public liberty of the realm." This motion was negatived. In the debate upon it (as related in the printed debates) the then attorney and solicitor general appear to have argued, That the clause in question gave no *new* power to the crown, and that it expressed no more than the law implies, namely, the power of the king legally exercised in his court of King's Bench, i. e. the king, as the law and constitution behold him *In Curia*. On the other hand, the mover of the question was supported by Mr. Dunning, in contending, That, whether such might be the legal effect and construction of this clause or not, still it *tended*, as far as it could, to give the king an unconstitutional and dangerous power; and that the crown lawyers of Charles II. who first advised it, would not have inserted it, if they had thought it nugatory: And as a confirmation of this, they said, that the reservation of this power to the crown in charters, *originated* in the reign of Charles II.

In consequence of the above declaration, in the speeches of the attorney and solicitor general, Lord Folkestone, after the conclusion of the first debate, moved, "That the said words contained in the said charter, do not reserve to the crown any power of amotion, except by the method of a judicial proceeding, in the due course of law." Those who opposed the former motion, wished to prevent the house from declaring any opinion upon this subject; and therefore when the latter was proposed, a motion was made on their part to adjourn. Upon this there was a division, and it was carried for the adjournment, by 127 to 46*.

* 35 Journ. 254, 255.

On the next day the subject was resumed, by Lord Folkestone's repeating his last motion; and then the others moved the previous question, which passed in the negative, by 118 to 46 *; and there the matter ended.

The charter has a clause respecting the amotion of the aldermen, expressed in similar terms to those before recited: The words are thus, "Which aldermen, or any of them, for any neglect or default, or any reasonable cause at the discretion of the mayor, justice of the peace, and the rest of the aldermen for the time being, or the major part of them, we will shall be amoveable"—This is likewise copied from the charter of Charles II, and, I presume, it could not be contended, that the power thereby given, could be exercised in any other manner, than such as could be legally justified in the court of King's Bench.

In the case of the corporation of Chester, lately determined in the court of King's Bench †, the merits of the above garbling clause underwent a judicial consideration. In the Chester charter, granted after that of Saltaſh, in the last year of Charles the Second's reign, there was a clause like that above recited; but directing the amoval of the members to be by order of the king *in council*, and to be signified under the seal of the council. And, in fact, in the succeeding reign, an amoval of *all* the members of this corporation was made by James II. conformably to the power herein reserved to the crown. One of the points of argument, maintained in the above cause was, That this clause of the charter was illegal, as tending to give the

* 35 Journ. 256.

† In Trinity Term, 1788:

king an arbitrary and unconstitutional power; that it so vitiated, and was so repugnant to the charter, as to render it altogether *void*. The particulars of the argument, and the answer it received from the counsel on the other side, may be seen in the printed report of the cause. It was not, however, fully discussed; as the judges thought it did not *immediately* affect the question then before them; which was, whether the cause, as it was then circumstanced, required a new trial. Upon the opening of this argument, Mr. Justice Buller said, "he thought the effect of such a clause could relate only to the individual members of the corporation, and not to the body itself." And afterwards, when the opinion of the court was formally given upon the case, the judges held, "that upon a sound construction of the whole charter, according to its *general* effect, this clause was not repugnant to it: Because, there being a provision in it, that upon every amotion, the *remaining members* should elect successors to the persons removed, the power of amotion must be understood, *sub modo*, viz. so as not enabling the crown to destroy the whole body at once, and to make such election impossible; but only to remove in such manner, as that the vacancies thereby made, might be from time to time supplied by the corporation. And consequently, that the amotion of *all* the members at once, by James II. was arbitrary, illegal, and void." The judgment passed in the King's Bench, in the above cause, is not yet to be considered as *final*; as a writ of error upon it is now pending, and expected to be determined in the House of Lords, in the course of the present session.

When

When the question arose in the case of Lyme, upon the charter of Charles II. (as mentioned in p. 28.) it was said to have contained this garbling clause; and was understood to be annulled, conformably to it, by the proclamation of James II. Nothing in that cause led to a particular examination of the charter; neither was the odious clause, nor any other part of it than that upon which the question of evidence (in p. 28.) was made, read to the Committee. But according to the doctrine in the Chester case, if the terms of the charter are similar to that, it may be doubtful, whether the corporation of Lyme has not been mistaken, in supposing their charter of Charles II. annulled by the proclamation. And there are some other boroughs, in which great confusion might be raised upon the same account. Note (K.) contains a copy of the proclamation abovementioned:

P. 225. (H.) The words of the order for giving leave of absence to Mr. Kynaston are, "That he be *discharged* from any further attendance on the said Committee *."

I do not know whether this form has been frequently practised on these occasions: I should think not; because the statute 10 Geo. 3. chap. 16. s. 21. uses the words, *leave obtained* by the house, and *excuse allowed*; and (in sect. 28.) leaves the members so excused, at full liberty to attend the Committee again: Though they are not intitled to vote, if they have been absent from one sitting. Therefore, regularly,

* Votes, May 2, p. 533.

the house cannot *discharge* a member from the attendance, when the act impowers him to be present.

The above order was made from a precedent in the Bedfordshire Committee, 14 April 1785, which is in the same words. Afterwards, when Mr. Pye's illness made it necessary to apply again to the house, the impropriety of this expression occurred to some gentlemen; and the chairman, in order to avoid it, when he reported his absence to the house, moved for a different order, which is entered on the Journals in these words: "That the said Select Committee have leave to proceed to-morrow morning, pursuant to their adjournment, although Mr. Pye should not be able to attend *." In the case of Mr. Brand, in the Gloucestershire Committee, March 3, 1777, an order of the same sort was made.

If any accident had prevented a third member from attending, on the day following Mr. Pye's illness, the proceedings of that Committee must have been stopped, unless one of the two, first excused, could have attended again. And it might have been doubted, perhaps, whether under the above order, Mr. Kynaston could have attended again.—Yet under an order of *excuse* only, he might on the next day, with a capacity of voting; as there would have been no *sitting* of the Committee intervening. For so I should understand this word in Sect. 28. of the act, *i. e.* a sitting *for trial*, and not a meeting merely to adjourn. See also Sect. 23 and 24. The act must be understood, to exclude from voting, only *such* members as have lost any part of the hearing of the

* Votes, May 3, p. 542.

cause by their absence ; as being thereby rendered incompetent to decide on the whole merits. Thus in Sect. 21. the act directs, that the Committee *shall never sit*, until all the members not excused are met.

The common form of late used in the house upon these occasions, expresses the *leave of the house* to the Committee, or a *direction* to them to proceed on their business, notwithstanding the member's absence. This seems to imply, that the Committee could not proceed without such leave or direction : But I know of nothing in the statute, that makes such order necessary. All that is wanting, is an order of the house for *excusing* the particular member from attending ; and if that were not to be had, the members of the Committee must, by the direction of the act, in Sect. 21. meet from day to day, without making any progress.

A case *might* occur, in which the house would be unwilling to excuse a member ; as, suppose one to refuse attendance, in contempt of the house, without any just cause : And yet there is nothing in the act, even in this case, to authorise the Committee to meet without him ; for the house is not impowered so to direct their proceedings. Yet the form of the order used in some cases of this sort, would suit such a case. As in this of Mr. Pye, he is not *excused* in express terms ; the only order of the house being, “ that the Committee may proceed without him.” So it is in the case of Mr. Walter, 35 Journ. 687.

I have seen but one precedent of an order made to excuse the member from attending, without any thing further ; but this form is most consistent with the provision of the law. It is in the Worcester case, 35 Journ. 516. Sir Walden Hanmer, a member of the

Committee, being taken ill, desires leave of absence, if his health should require it; upon which the house make the following order, "That Sir Walden Hammer, Bart. have leave to absent himself from any further attendance on the said Committee, if his health shall require it." I observe in the entry of the application for this leave of absence, that the cause of it was not verified *upon oath*.—But this ought to have been done; for the house are impowered, by the act, to grant the leave required, only where *special cause is shown and verified upon oath*. There is the same omission in the case of Mr. Walter, abovementioned, on the same Committee.

The caution with which the statute proceeds, in requiring so much formality in this point of excusing a member's attendance, is the occasion of much unnecessary delay and expence to the parties. At the time when this law was proposed, the minds of men, acting under the experience of much foul play in the management of elections *in the house*, were well disposed to every regulation, that seemed to put checks or guards upon the future determination of them. Perhaps a suspicion that similar practices might prevail in the proposed new tribunal, was then entertained by some men; and therefore they wished that every thing to be done there, even relating to forms of proceeding, and all secondary matters, should be attended with much open formality, for the sake of being observed by the house at large. The regulation in question seems to have been contrived for such a purpose. But after the experience we have had of the spirit prevailing in this institution, it would not be amiss to throw off such restraints upon it, as may have been intended for the above purposes, and serve no other. Why

should not the Committee itself, an independent and dignified court of Justice, be enabled to judge of a disability in one of its members to attend his duty there, in the same manner as the House of Commons? A whole day is lost to the members and the parties, by this regulation, even when the house is sitting; to the great inconvenience of both, as well as considerable expence to the latter; and if the house should have been adjourned to a future day, the whole intervening time is lost in the same manner. Whereas by allowing the same power to the Committee, as is given to the house, the proceedings might be continued without interruption, upon all occasions of this sort.

Perhaps this subject and others in which the same principle will be found to have operated, in the original scheme of the new tribunal, may deserve consideration, when an alteration of the Grenville act shall come before parliament.

¶ The reader may perceive, that this note was written in the view of being published before the stat. 28 Geo. III. Ch. 52. was proposed in parliament.

P. 159. * (I.) The following is a copy of the act of surrender. "To all to whom these presents shall come The Mayor & Freeburgesses of the burrough of Saltash, which said burrough is situate & being in the county of Cornwall, send greeting, Know yee that the said Mayor & freeburgesses upon good considerations them hereunto moveing, have granted & by these presents doe grant unto our soveraigne lord the king & to his heirs & successors ALL and singular the man-
nors

hous messuages lands rents tenements & hereditaments with the appurtenances whatsoever, whereof or wherein the said mayor & freeburgesses are now or at any time heretofore have beene any way seized possessed or interested, in right of their corporation or in their corporated capacity by any means howsoever And alsoe ALL and all manner of chattels as well reall as personall & all termes of years trust uses and confidences of chattels & termes for years whatsoever, whereof or wherein the said mayor & freeburgesses are at present any way interested or possessed And further the said mayor and freeburgesses for the considerations aforesaid doe hereby grant unto our said soveraigne Lord the King his heires & successors ALL & singular debts and duties now due or owing to the said mayor & freeburgesses by judgment specialty or otherwise howsoever. And further for the considerations aforesaid the said mayor & freeburgesses have granted surrendered & yielded up and by these presents doe grant surrender & yield up unto our said soveraigne lord the king's most excellent majesty ALL franchises charters letters patent of incorporation powers privileges libertyes & immunities whatsoever at any time or times heretofore granted to or held or enjoyd by the said mayor & freeburgesses or their or any of their predecessors, by any wayes or meanes or by what name or names soever, To the intent and purpose nevertheless that his majesty would be graciously pleased to reincorporate the said burrough & to regrant all and singular the premises aforesaid to such new corporation in such manner & form as to his majestie shall seem meet AND lastly the said mayor & freeburgesses do hereby constitute & appoint & in their place & stead putt the right

honble John Earl of Bathe Anthony Best Henry Wyme & James Fuller gent^s. their attornies jointly & severally to acknowledge these presents & the same to deliver unto the high court of Chancery there to be inrolled of record And further to act and doe whatsoever shall be necessary for the making of these effectual in law according to the true intent & meaning thereof In witness whereof the said mayor & free-burgesses have hereunto affixed their comon seale this 22 Jan^y. in the 34th year of the raigne of our most gracious soveraigne Lord Cha^s. the Second by the grace of God King of England Scotland France and Ireland Defender of the Faith and in the year of our Lord God 1682."

This is a true copy from the original record remaining in the chapel of the Rolls, having been examined.

John Kipling,
Clerk of the Rolls.

P. 160. ** (K.) The following is a copy of the proclamation; which being a state paper frequently mentioned in cases of this nature, may be likewise found useful for reference upon other occasions; as I have not seen it any where in print.

" Anno Regni Regis JACOBI secundi Quarto.

" A Proclamation for restoring corpora^ons to their antient charters libertyes rights and franchises.

" WHEREAS WEE are informed that severall deeds of surrender which have been lately made by severall corpora^ons and bodes corporate of & in our cities
and

and townes within our Kingdome of England and dominion of Wales, of their charters franchizes & privileges, are not recorded or enrolled And that upon the proceedings and rules for judgment which have lately been had upon the *Quo Warrantos* or informations in nature of a *Quo Warranto* judgments are not yett entred upon record: Whereupon notwithstanding, new charters have been granted in the reigne of our late deare Brother and in our reigne—Which said deeds (being not enrolled or recorded) doe not amount unto, or in lawe make any surrender of the charters franchises or liberties therein menconed. And such of the said corporacons or bodies politiq. against which rules for judgments have been made in the life time of our late deare Brother, or since, in our court of King's Bench (but noe judgments entered upon record) are not disincorporate or dissolved: And that itt is in our power to leave such corporacons in the same estate and condicon they were in, and to discharge all further proceedings and effects that may be, of such rules for judgments and deeds of surrender WEE doe hereby publish and declare That upon due searck and examinacō made Wee have satisfaccō that the deeds of surrender made by the corporacons and bodies politiq. of the said cities and townes, except the corporacons following (that is to say) *Thetford Nottingham Bridgewater Ludlow Bewdley Beverly Tewkesbury Exeter Doncaster Colchester Winchester Launceston Liskerd Plumpton Tre-goney Plymouth Dunwich St. Ives Forvy East Looe Camelford West Looe Tintagell Penryn Truro Bod-*

min Hadleigh Lestwythell and Saltaſh are not enrolled or recorded in any of our courts: And that tho rules for judgments have paſſed upon informacons in nature of a *Quo Warranto* againſt the corporacons and bodies politiq. of ſeverall cities and townes in our ſaid kingdome and dominion; yet noe judgments have been or are entered upon record upon any ſuch informacons, except againſt the city of *London Cheſter Calne St. Ives Poole York Thaxted Langhour & Malmesbury*: AND WEE of our meer grace and favour, being reſolved to reſtore and putt all our cities townes & burroughs in England & Wales & alſoe our town of Barwick upon Tweede into the ſame ſtate and condicon they were & was, in our late deare brother's reigne, before any deed of ſurrender was made of their charters or franchizes, or proceedings againſt them or the corporacons or bodies politiq. in or of the ſaid cities townes or burroughs, upon any *Quo Warranto* or informacons in nature of a *Quo Warranto* had WEE do hereby therefore publiſh declare direct and require, that the ſaid corporacons bodies politiq. and corporate of all the ſaid cities townes and burroughs, whoſe deeds of ſurrender are not inrolled nor judgments entered againſt them, as aforeſaid, And the mayors bayliſſs ſheriffſs aldermen common-councilmen aſſiſtants recorder town clerkes magiſtrates miniſters officers freemen & all & every others the members of or in every of them, reſpectively, upon the publication of this our proclamation take on them & proceed to act as a corporacon or body politiq. And where places are vacant by death

or otherwise, to make eleccōns, constitute & fill up the same, notwithstanding the usuall dayes & tymes of eleccōns by the antient charters and constitucōns shall happen to be past : And to doe execute & performe all & every matter and thing as they lawfully might & ought to have done, if no such deeds of surrender, rules for judgment, or other proceedings upon any such *Quo Warranto* or informacōns had been had or made.

AND for the better effecting our said intencōn WEE have by order made by us in council & under our signe manuall And Wee doe alsoe by this our proclamacōn made with the advice of our said council, Discharge and remove & dismisse all & every person & persons of & from all offices & places of mayors bayliffs sheriffs aldermen comōn-councilmen assitants recorder towne clerke & all & every office & place, which they or any of them have or clayme only by charter patent or grant from our deare brother or from ourselfe, since the dates of the respective deeds of surrender or rules for judgment EXCEPT such corporacōns whose deeds of surrender are inrolled, or against whom judgment is entered AND that all & every such person & persons, deliver up into the hands & custody of the said persons hereby appointed & intended to act & execute the said offices & places, all & every y^e charters records books evidences & matters concerning the said respective corporacōns

AND WEE hereby further publish & declare that we have caused all & every the said deeds of surrender which can be found, to be delivered & put

into the hands of our attorney generall, to be by him cancelled & returned to the corporacōns & bodies politiq. of the respective cities & townes whom they concerne, And have alsoe given to our said attorney, authority & doe hereby warrant & comand him, not onely not to proceed or enter judgment upon the said *Quo Warrantos* or informacōns in nature of a *Quo Warranto* or any of them, but to enter upon the respective records *Noli prosequi* & legall discharges thereof.

AND WEE doe hereby publish & declare our further grace & favour to the said cities corporacōns & burroughs, at any time hereafter by any further act, to grant confirme or restore unto them all their charters liberties franchizes & privileges that att the respective times of such deeds of surrender or rules for judgment made or given, they held or enjoyd. AND in order to the perfecting our said gracious intencons, wee doe hereby likewise publish & declare our royall will & pleasure as for & concerning the restoreing to such of our cities corporacōns and burroughs within our said kingdome & dominion, which have made deeds of surrender, or have had judgment given against them, which surrenders & judgments are entered of record, that our chancellor attorney generall & solicitor generall without fees to any officer or officers whatsoever upon application to them made, shall & they are hereby required to prepare & passe charters instruments grants & letters patents for the incorporateinge regranting confirmeing & restoreing to all & every the said cities corporacōns & burroughs their
respec-

respective charters liberties rights franchises & privileges, and for restoring the respective mayors bayliffs recorders sheriffs towne clerkes aldermen comon-councillmen assistants officers magistrates ministers & freemen as were of such cities corporacons or burroughs, at the time of such deeds of surrender or judgments respectively given or had; and for the putting them into the same state condition & plight they were in at y^e time of such deeds of surrender or judgments made or given.

AND WHEREAS diverse burroughs that were not heretofore corporacons, have since the year 1679 had charters of incorporacon granted & passed unto them, Wee hereby further expresse & declare our royall pleasure, to determine & annull the said last mencond charters and corporacons, And to that end wee have, in pursueance to the power reserved in the said charters, by our order in councill & under our signe manuell, removed & discharged AND WEE doe alsoe by this our proclamation made with the advice of our said councill, Remove all & every person of or in the said last mencond corporacons, of & from all offices & places of mayors bayliffs recorders sheriffs comon-councillmen assistants & of & from every other office & place from which wee have power reserved by the said charters respectively to remove or discharge them. AND WEE doe hereby promise & declare, that we will doe and consent to all such acts matters & things as shall be necessary to render these our gracious intencons & purposes effectuell. It being our gracious intencon to call a parliament, as soone as the generall disturbance of
our

our kingdome by the intended invasion will admitt thereof. Given at our court at Whitehall the 17th day of October."

This is a true copy from the original record remaining in the chapel of the Rolls, having been examined.

John Kipling,
Clerk of the Rolls,

X.

THE

C A S E

Of the BOROUGH of

N E W P O R T,

In the County of SOUTHAMPTON.

The Committee was chosen on Tuesday the 22d of February, 1785, and consisted of the following Members:

Henry Duncombe, Esq; *Chairman.*
Benjamin Bond Hopkins, Esq;
Watkin Williams, Esq;
John Hill, Esq;
George Vansittart, Esq;
David Howell, Esq;
William Morton Pitt, Esq;
Thomas Fitzherbert, Esq;
William Lygon, Esq;
George Jennings, Esq;
Thomas Kempe, Esq;
William M'Cormack, Esq;
William Pearce Ash A'Court, Esq;

NOMINEES.

Lord Arden, *Of the Petitioner.*
Henry James Pye, Esq; *Of the Sitting Member.*

PETITIONER.

John Barrington, Esq;

Sitting Member.

Edward Rushworth, Esq;

COUNSEL.

For the Petitioner,

Mr. Wilson, and Mr. Jekyll.

For the Sitting Member,

Mr. Piggot, and Mr. Chambre.

T H E
C A S E
Of the BOROUGH of
N E W P O R T.

THE petition alledged, that the sitting member had been admitted into the holy orders of Deacon, in April 1780, and licensed to serve a curacy; that by virtue of this ordination, he had exercised the function of a clerk in holy orders, in the parish church of *Newport* and other churches; that being, at the time of his election, a clerk in holy orders, he was not capable of being elected to serve in parliament; of which incapacity the electors were informed, before the election took place, and also that their votes for him would be thereby lost. That, notwithstanding, several did vote for him, and were received by the returning officer, who returned him as duly elected, although the petitioner was duly elected, and ought to have been returned in his stead*.

* See 40 Journ. 31.

The poll at the election for this borough stood thus:

For Edward Rushworth, Esq;	15
Hon. Hugh Seymour Conway	13
John Barrington, Esq;	3

There was no objection to the election of Mr. Conway.

The allegations of the petition were satisfactorily proved. Mr. Rushworth had been ordained a deacon by the bishop of Winchester, and had preached in the church of Newport in 1780. When the electors were assembled for the last election, they were told by the petitioner's counsel, that Mr. Rushworth was in deacon's orders, and ineligible; and that any votes for him would be thrown away. Since the year 1780, Mr. Rushworth had not been seen in the office or habit of a clergyman, but always in a lay habit. In the general election in the same year, he was elected member for Yarmouth in the Isle of Wight, and sat in parliament upon that election.

In the course of the cause, the counsel for the petitioner were asked by one of the Committee, whether it was admitted that Mr. Rushworth had, for some years, ceased his ecclesiastical function; to which they answered, they were not informed upon the subject.

The

The petitioner's case consisted of two points; his counsel contending,

1st. That Mr. Rushworth, being a clerk in orders, was not capable of being elected a member of parliament.

2d. That the electors, who voted for him, after notice of his incapacity and its consequences, threw away their votes; and that therefore the petitioner must be declared duly elected.

I shall confine my account of this case to the arguments upon the first point; because, the opinion of the Committee having rendered it unnecessary to consider the second question, the arguments upon it would seem, in this place, an incumbrance to the first; although, in their delivery, they were full of useful knowledge and ingenious observation *.

The counsel for the petitioner argued thus:

According to the constitution of parliament, a clerk in orders is incapable to sit in the House

* As the arguments and authorities upon this question of votes thrown away, have been used upon other elections, and may be often recurred to in future, I propose to arrange them altogether, and present them in a body to the reader by themselves; to prevent a repetition of them in the several cases. If the materials I have in readiness, should not make this volume too bulky, they will be annexed at the end of it.

of Commons. The description of a *clerk in orders* includes the characters both of *priest* and *deacon*. This incapacity will appear by a consideration of the law of parliament, and of the ecclesiastical law.

There are but few instances in the Journals of the House of Commons, in which this law of parliament is recognized; those few, however, expressly support the position contended for. The first case happened in the reign of Queen Mary, 13th of October, 1553. The words of the Journal (Vol. I. p. 26) are as follow: "It is declared by the commissioners, that Alexander Newell, being prebendary in Westminster, and thereby having voice in the convocation house, cannot be a member of this House; and so agreed by the House; and the Queen's writ to be directed for another burghers in that place*."

The next case was in the reign of James I. 7th of February, 1620-1, 1 Journ. 511. It is in these words: "All of opinion against . . . a *clerk* returned; because—had or might have a voice in the convocation house; therefore not fit to be admitted here: And would have fined the

* On the preceding day the House had appointed six members to be a committee, (whom the Journal here calls *commissioners*) to inquire into the right. The secretary of state was one of the six.

town but for their poverty." This was the unanimous opinion of the Committee of privileges. The consideration of the point being deferred by the House till the next day, the resolution of the Committee was, on that day, confirmed by the House, as appears in p. 513 of the Journal *. The return was adjudged to be void, and a new writ ordered. The Journal states Sir Edward Coke to have observed, in the debate, " that when he was speaker, one was put out; and that he saw † Alexander Nowell put out, (though he had not *curam animarum*) because of the convocation house."

The third case was in 1661, Jan. 17, 8 Journ. 341, 346. Dr. Cradock being in holy orders, was returned for Richmond, and was petitioned against. The House directed the Committee to inquire " whether he was in holy orders, and so disabled to sit." The chairman reported, " That it appeared to them, that Dr. Cradock was in holy orders; and that Mr. Wandesford (the petitioner) had the majority of voices present at the election; and the opinion of the Committee, that Dr. Cradock was incapable of

* Here he is described " a minister returned for *Morpeth* in Northumberland."

† Mr. Hatfield, in 2 Preced. p. 8, observes, that here must be some mistake, as Sir Edward Coke was born in 1550, and the case happened in 1553.

being elected a burgefs for the borough, and that Mr. Wandesford was duly elected, and ought to fit." On which the Houfe refolved "to agree with the Committee, that Dr. Cradock was a perfon incapable to be elected, and his election void; and that Mr. Wandesford was duly elected, and ought to fit in the Houfe."

The true principle that governed thefe cafes was, the being in *holy orders*. The fame doctrine was mentioned as eftablifhed, in the debate upon the attorney general's feat in the Houfe, on the 11th of April, 1614 *. Mr. Finch, in that debate, names "fheriffs, *in orders*, and judges" (A) as perfons lying under known difqualifications for a feat in the Houfe of Commons. Mr. Hackwill, fpeaking in the fame debate, gave the example of the Mafter of the rolls, in former times, as another exception, "becaufe then all mafters of the rolls were in *holy orders*, and fo could not be of this Houfe."

Thus, as far as examples go, they appear to have been uniform in the exclusion of clerks in orders. They have been confirmed by a long experience in modern times. The road of preferment offered to ambitious men, through the Houfe of Commons, is fo fure, that it is not to be questioned but the clergy would have taken

* 1 Journ. 460.

it, if it had been open to them. Yet no instance occurs of any clergyman, known to bear that character, who has ever attempted to become a member, since the times from whence the above examples are taken.

The reason of the doctrine is founded, not only in the constitutional separation of the two orders of the laity and clergy, but also in the legislative constitution of this kingdom.

Originally the clergy had separate rights of society, and a separate legislation from the laity. They were represented in convocation; and by the authority of that assembly, all laws affecting them, either in person or estate, were passed. Taxes were levied upon them by acts of convocation, and not by acts of parliament.

Blackstone, in enumerating the classes of persons who cannot sit in the House of Commons, mentions *the clergy*, "because they sit in convocation *."

In 4 inst. 47, Coke establishes the same doctrine: He says, "None of the clergy, though they be of the lowest order, are eligible, because they are of another body, viz. the convocation †."

This

* 1 Blackst. Com. 175.

† On the same day in which this question was considered, the Committee reported the case of a Scotch peer, (Lord Falkland) returned for Hertfordshire, as a case of difficulty

This argument is open to two observations, which it is necessary to anticipate. It may be said, that deacons are not members of the convocation, or not represented there: And likewise, that the convocation has not, in modern times, exercised the right of taxation or legislation.

As to the first, the convocation is the representation of the whole body * of the clergy. It is assembled by the authority of the king's writ to each of the archbishops, to call together " universos & singulos episcopos, nec non archidiaconos decanos & omnes alias personas ecclesiasticas cujuslibet dioceſeos, &c." †

The

for the House to determine. In the debate upon the question, whether Lord Falkland might sit or not, Mr. Hackwill and Sir Edward Coke speak for receiving him; and distinguish his case from that of peers of England, who are rejected " because they serve in another house of parliament; as clerks in the same manner, *because of the convocation.*" See 1 Journ. 512.

* See 12 Co. 73.

† In a copy of the writ for proroguing the convocation, which Gibson has published, (2 Cod. Append. 65.) together with the writ of summons, both from precedents in the reign of Henry VIII. the words are, " Episcopos, &c. ac Decanos ecclesiarum cathedralium, nec non Archidiaconos, Capitula, & Collegia totumque clerum cujuslibet dioceſeos, &c." The king's writ is general; but the archbishop, in his summons, prescribes the *manner* of assembling, viz. bishops, deans, and archdeacons, (and abbots and priors formerly) in their proper persons; and the chapters of the several

The acts of the convocation bind the clergy in *re ecclesiasticâ*, as much as an act of parliament. This has always been the language of our judges, as may be seen in Salk. 412. Carth. 485. 1 Atkins, 665. Even those canons which do not *proprio vigore* bind the laity, are yet binding on the clergy.

There are many cases in which persons are considered by our constitution, as parties to the making of laws, though they have no votes in electing members of parliament; as minors, women, tenants in antient demesne, and those who have no freeholds. In the same manner as these are a part of the commonalty of the realm, so are deacons a part of that body represented in convocation.

Secondly, although since the year 1664, there has been a change, *in fact*, in this part of our constitution, the principle continues the same; and the convocation possesses still, whenever it may choose to exert it, the full and sole authority to impose taxes upon the clergy. This appears from the manner in which this change was brought about; an account of which is related in the second volume of Mr. Hatfield's Prece-

Several dioceses by one, and the clergy by two proctors, with full powers; as is directed by the *Præmunientes* clause. See the manner of assembling the convocation, described at length in Cowell's Interpreter, tit. *Proctors*.

dents, p. 10, in a note of the speaker Onslow's, in the following words :

“ This was first settled by a verbal agreement between Archbishop Sheldon and the Lord Chancellor Clarendon, and tacitly given into by the clergy in general, as a great ease to them in taxations. The first public act of any kind relating to it, was an act of parliament passed in 1664-5 *, by which the clergy, in common with the laity, were charged with a tax given in that act, and were discharged from the payment of the subsidies, which they had granted before in convocation. But in this act of parliament there is an express saving of the right of the clergy to tax themselves in convocation, if they think fit †. Gibson, bishop of London, used to say that this was the greatest alteration in the constitution ever made, without an express law.” (B.)

* 16 and 17 Charles II. ch. 1.

† It is in the following words, as I find them in 2 Gib. Cod. 984 ; for these subsidy acts are not printed among the Statutes at large. “ Provided always, That nothing herein contained, shall be drawn into example, to the prejudice of the antient rights belonging unto the lords spiritual and temporal, or clergy of this realm, or unto either of the universities, or unto any colleges, schools, alms-houses, hospitals, or cinque ports.”

The

The saving clause, inserted in the stat. 16 and 17 Charles II. ch. 1. left them at full liberty to exercise their own powers of legislation, if they should prefer them to those of the parliament.

Thus the case stands, upon the footing of the general law and usage of parliament. By tracing the principles of the ecclesiastical law, it will be seen, that there is a fundamental separation established by that law, between the lay and clerical functions; which effectually prohibits any clergyman from exercising such an office as the fitting member is called to.

Stillingsfleet* says, the church as well as the nation at large, has its *lex non scripta*, which is founded in immemorial usage alone, and therefore may be distinguished by the name of the common law *ecclesiastical*; because the common law extends to all those customs which have obtained the force of laws. This is also the opinion of Lord Chief Justice Hale, in one of his manuscripts on the ecclesiastical power, not printed †; and of Judge Whitlocke, in the case
of

* Eccl. Cases, Part 2. p. 10, 11.

† I have been favoured with a copy of the passage here alluded to: It is extracted from an original MS. intitled, *Preparatory Notes, touching the Rights of the Crown*, in which there is a chapter on the ecclesiastical power; which work was communicated to Mr. Hargrave, by one of the Chief Justice's descendants. The extract is in these words: "When

of Evers and Owen, Godb. 432. Upon this authority depend the institutions of parishes, and of the clerical orders of bishops, priests, and deacons: The canon law has not founded, but only regulated these institutions. Those canons which prohibit the interference of the clergy in secular concerns, are only declaratory of the original establishments of the church: Which herein had two objects; first, to preserve the purity and sacredness of their character; secondly, to confine the priesthood to their religious duty. The 76th canon of 1603, was made with this view: "No man being admitted a deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman, upon pain of

christianity was first introduced into this island, I conceive it came not in without some form of external ecclesiastical discipline, or coercion; though, at the first, it entered into the world without it. But that external discipline could not bind any man to the submission to it, but either by the immediate power regal, where the king received it, or by the submission of those that did receive it. If the former, then it was the civil power of this kingdom which gave that form of ecclesiastical discipline its life: If the latter, it was but a voluntary pact or submission; which could not give it power longer than the party submitting pleased, and than the king allowed, connived at, and not prohibited it. And this, by degrees, introduced a custom, whereby it came equal to other customs or civil usages."

excom-

excommunication*;" and the churchwardens are required to present the names of those who so forsake their calling, to the ordinary. This canon is taken from one of the provincial constitutions in 1571, almost in the same words: "Semel autem receptus in *sacrum ministerium* ab eo imposterum non recedet; nec se aut vestitu aut habitu aut in ullâ vitæ parte geret pro laico †." Here is a positive and general law. Upon the authority of it, the four law societies, a few years ago, all agreed that they ought not to call a gentleman in priest's orders to the bar; and accordingly Mr. Horne, upon whose case the consultation was had among them, was refused to be called ‡. Yet there is a much greater

* 1 Gibb. Cod. 184. The words in the original, in 4 Wilk. Conc. 393, are, "Nullus in diaconi aut presbyteri ordinem semel admissus, quovis deinceps tempore ab eodem volens recedet; nec in vitæ suæ instituto pro laico se geret sub pœnâ excommunicationis."

† 1 Gibb. Cod. 184.

‡ This question arose in the society of the Inner Temple, of which Mr. Horne was a member, and in which he had been permitted to go through the ordinary previous forms of preparation for the bar. When the time for receiving his call to the bar came, the benchers conceived his case to be difficult, and wished to take the opinion of the three other societies upon it. Accordingly they stated it in the following words, and communicated it to each of them, viz.

"A gentleman in priest's orders, having applied to the benchers of the Inner Temple, desiring to be called to the bar,

greater analogy between the two functions of priest and barrister, than between the former and that of representative: For, antiently, the clergy pleaded commonly at the bar of the secular courts, and were regular advocates; which occasioned the proverbial saying, *Nullus clericus nisi causidicus*.

A more antient constitution in the reign of Henry III. in 1222, enacts, "Ne clerici beneficiati, aut in sacris ordinibus constituti, villarum procuratores admittantur, viz ut sint Seneschalli aut Ballivi talium administrationum, occasione quarum Laicis in reddendis ratiociniis obligentur; nec jurisdictiones exercentur seculares, præsertim illas quibus judicium sanguinis est annexum *." The Apostolic canons still more antient, forbid secular pursuits in these words: "ἢ Πρεσβύτερος ἢ Διάκονος γρατεῖα σχολάζων καθαρείσθω."

bar, they are desirous to know the opinion of the benchers of the other law societies, whether it is proper to call such person to the bar. By the 76th canon of 1603, (&c. *stating it as in p. 280*) The benchers of Lincoln's Inn returned the following answer to the application.

"Lincoln's Inn, 16th of June, 1779.

"The benchers now present (being eleven in number) are unanimously of opinion, that it is not proper to call a person in priest's orders to the bar."

And a verbal answer, to the same effect, was sent from the benchers of the Middle Temple and Gray's Inn.

* 1 Gibb. Cod. 180.

There

There are but two ways of evading the operation of these laws; either by contending that a clerk in orders, or particularly in the orders of *deacon*, may absolve himself from his spiritual office, and renounce it; or, that a deacon is not so far admitted into it, as to be included in the word *ministry*. As to the first, the 76th canon forbids any such renunciation, either by *priest* or *deacon*, under the pain of excommunication. If, therefore, the putting off this character be unlawful, and a deacon cannot become a member of parliament, without putting it off, he must become such by an unlawful act. That by such act, he can acquire a right, is a proposition too monstrous to be maintained. As to the second, the common expression of the canons and ecclesiastical writers is, the *minister* and the *ministry*; which is meant of that person whom the common law calls a clerk in orders. *Sacrum ministerium*, is the phrase of the constitution of 1571; *in sacris ordinibus* that of 1222; deacon or minister in the 76th canon. There was, formerly, another degree of persons in holy orders, acknowledged by our law, as appears by the statute 23 Henry VIII. ch. 1. f. 1. which describes them in these words: "of the orders of *subdeacon* or above." Therefore a deacon, being of a superior order, is certainly in holy orders.

The

The forms of ordination shew that a deacon is completely invested with the ministry. The bishop therein gives him " authority to execute the office of a deacon in the church of God, committed unto him ;" and (delivering him the bible) " to read the gospel in the church of God, and to preach the same." The imposition of hands, prayer, and solemn vow, are equally essential to both ordinations, of deacon and priest. In the case of the former, the bishop proposes this question to the candidate: " Do you trust that you are inwardly moved by the Holy Ghost to take upon you this office and ministration, to serve God for the promoting of his glory, and the edifying of his people?" The answer is, " I trust so." Then comes the following question: " Do you think that you are truly called, according to the will of our Lord Jesus Christ, and the due order of the realm, to the *ministry* of the church?" The answer is, " I think so." In the ordination of priests, the question is substantially the same; only, instead of the words *ministry of the church* in the above question, the words proposed to the priest are, *order and ministry of priesthood**. The words of ordination, pronounced by the bishop, do not convey to the

* See the title *Ordination* in Gibb. Cod. and Burn Eccl. Law, containing the whole of these forms,

latter

latter any higher spiritual authority than the other; except in the article of ministering the holy sacraments, and that of absolution*; which duties are particularly appointed to priests alone. Yet baptism, which is one of the church sacraments, is performed by deacons. The solemn vow which deacons make, is more important than that made by the priest; and shews clearly, that the *ministry* to be executed by both, is undertaken upon the first ordination; and that the second only raises the person to a higher rank in the *same* ministry †. Ayliffe's Parergon, p.

399,

* The bishop says to the candidate, "Receive the Holy Ghost, for the office and work of a priest in the church of God, now committed unto thee by the imposition of our hands. Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained. And be thou a faithful dispenser of the word of God, and of his holy sacraments, in the name of the Father, and of the Son, and of the Holy Ghost." And (delivering the bible) the bishop says, "Take thou authority to preach the word of God, and to minister the holy sacraments, in the congregation where thou shalt be lawfully appointed thereunto."

1 Gibb. Cod. 175,—6.

† The following words of the Preface to the forms of consecration and ordination, confirm this position: "It is evident unto all men, diligently reading holy scripture and ancient authors, that from the apostles' time there have been these orders of *ministers* in Christ's church; bishops, priests, and deacons. Which offices were evermore had in such reverend estimation, that no man might presume to execute

any

399, confirms this observation. His words are, " I shall take a view of holy orders as a sacred sign or seal, as it were, of some grant, whereby a spiritual power is given to the person ordained, to exercise some sacred office or ministry in the church: And this, I think, is almost uncon-

any of them, except he were first called, tried, examined, and known to have such qualities as are requisite for the same; and also by public prayer, with imposition of hands, were approved and admitted thereunto by lawful authority."

1 Gibb. Cod. 115. Burnet, in the Addenda to the first volume of his History of the Reformation, (Appendix, N^o V.) has printed a paper under the title of " A Declaration made of the Functions and divine Institution, of Bishops and Priests," in the time of Lord Cromwell's ecclesiastical power, (about the year 1537) and signed by him, the archbishops, 11 bishops, and 20 other divines, beginning with these words: " As touching the *sacrament* of holy orders, we will that all bishops and preachers shall instruct and teach our people, committed by us unto their spiritual charge—First, &c."—Then follow, among other things, instructions relating to the divine institution of orders in the church: And, after setting aside the inferior degrees of orders in the foreign churches, the paper concludes in these words, " In the New Testament there is no mention made of any degrees or distinctions in orders, but only of *deacons* or *ministers*, and of *priests* or *bishops*."

The canons 31, 32, 33, 34, 35, 36, (4 Wilk. Conc. 385-6) throughout, apply the phrase of *holy orders*, or the *ministry*, to both deacons and priests; and so the statutes 13 Eliz. ch. 12, and 13 and 14 Charles II. ch. 4. It might be contended, that a *deacon* is *ex vi termini* peculiarly the *minister*: For Διάκονος is translated *minister*, *famulus*; from whence the verb Διακονέω (*famulor*, *ministro*) is derived; and the comparative Διακονέω is *expeditior in ministrando*.

testably

testably acknowledged to belong both to priests and deacons, from the very beginning of christianity itself. Though some persons have denied bishops to be a distinct order, from presbyters and elders in the church." In the same page, afterwards, he speaks of "the apostles' establishing the three orders of *ministers*, under the names of bishops, priests, and deacons."

Though, at this day, deacons cannot hold livings with cure of souls, that is not according to antient institution, but an innovation by the stat. 13 & 14 Charles II. ch. 4. s. 14. In other respects, the clerical function differs very little from that of priests.

It is in consideration of the sacredness of their character, that the law indulges the clergy with many privileges and exemptions from the common civil duties, to which the laity are subject. There is a writ in the register to exonerate them from secular employments, if they should be appointed to them against their will*. In 1 Lev. 303 and 1 Vent. 105, in 22 Charles II. is a case of a clergyman, elected to an office in the management of Romney marsh; who, upon his application to the court of King's Bench, was discharged by the judges, upon the authority of these words in the register: "*Vir militans Deo non implicetur secularibus negotiis*," and "*non*

* 2 Inst. 3, 4. See 3 Burn, Eccl. Law, 180—191.

ponantur clerici in officia." It is not only their privilege, but they have been compelled by penalties to uphold it. Nelson, in p. 187 of his Rights of the Clergy, cites cases in which the high commission court had fined clergymen for intermeddling in secular concerns*. The same principle guided the legislature in the stat. 21 Henry VIII. ch. 13, which forbids all spiritual persons to carry on farming. The preamble shews, that it had in view the purity of the sacerdotal office.

Thus, whether the distinction is considered as a privilege, or as a burthen, it is alike preserved and enforced, both by the law of the land and of the church.

* No clerk within holy orders, though he held a knight's fee, could be compelled, in the times of knighthood, to be made a knight; according to the stat. *de Militibus*, 1 Edw. II. Lord Coke, in his comment on it, 2 Inst. 598, cites Matt. Paris, 29 Henry III. p. 882, in these words: "Rex, die natali, Johannem de Gatesden clericum, & multis ditatum beneficiis, sed omnibus ante expectatum resignatis, quia sic oportuit baltheo cinxit militari." So that, in this respect, the exemption was considered, at that time, to be a *privilege* to the order, which might be waved. Matt. Paris goes on to relate of this new knight, that he being very rich, and desirous of gaining further honours in the state, *curam exuens animarum periculosam*, relaxed still further, by marrying a lady of rank. Edit. 1684, p. 574. This happened in the year 1245.

The counsel for the sitting member argued to the following effect.

The point in dispute is a matter of merely temporal right, and the question must be determined by the law of the land; not by the canon, or ecclesiastical law, upon which the petitioner founds his objection. It is not necessary to contend now, that a *priest* may sit in parliament; though, if it were, the subject furnishes materials for supporting that position likewise. It is enough for the sitting member's purpose, that *deacons* may. The counsel for the petitioner, by involving together these two distinct characters, have given some appearance of strength to their argument.

On the part of the sitting member, it is contended, that deacons are not excluded from the House of Commons, either by the law of parliament, as it is explained in the cases cited, or by the common law, or by the canons: That the supposed disqualification never extended to deacons; and that even if it did, the reason of it has long ceased.

All the three cases of exclusion, taken from the Journals, appear to have been founded in a reason drawn from the rights of the convocation; which, indeed, seems to be admitted in one part of the argument on the other side. Before this argument is answered, it will be worth while to

examine these cases. The most modern, and therefore the most pertinent, is clearly founded on an extrajudicial opinion of the election committee; for Cradock, the clergyman, said to be incapable, had not the majority of votes. It was, therefore, only a speculative opinion, not warranted by the case, perhaps not argued by the counsel; and ought not to have made part of the report. The clerk is there called a *doctor*; from whence it is to be presumed, that he was a doctor of divinity, and in *priest's* orders; which furnishes another argument against this case. Nowell is described as a *prebendary*: It is to be presumed that he too was a *priest*. This explanation being applicable to two of the three cases, it may well be inferred, that the third is also open to it; particularly after observing, that Sir Edward Coke, in alluding to the case, (in 1 Journ. 512) seems to understand it so; and he says, in 4 Inst. 47, that he was a prebendary.

But the case of Nowell is also open to another answer. The proceedings of the House of Commons, in the reign of Queen Mary, had not attained to sufficient regularity to intitle them to the authority of precedents: And it appears, by the account which Dr. Hody, in the Appendix to his History of Convocations, gives of the same case, that Nowell was turned out by the influence of the court, for being a zealous protestant;

testant; and, consequently, a determined opposer of their measures *. The citation from Carte's History, by Mr. Hatfell, in his note in 2 Prec. 7. leads to the same inference; for Dr. Tregonwell, a prebendary of the same church with Nowell, was permitted to sit in that House as Sir Thomas Haxey †, in the reign of Richard II. and other clergymen had formerly done.

The authority of Mr. Finch's speech, in one of the above debates, which has been relied upon on

* See his book, p. 429. The note in his Appendix, is in these words: " Our historians observe of that House of Commons, that they were chiefly such as the government had pickt out for the subversion of the protestant religion. No wonder, therefore, if Alexander Nowell, a zealous protestant clergyman, was ejected upon *that new pretence*, that the clergy were incapable of sitting there. There seems to have been some other clergymen returned at the same time as burgesses; for our historians tell us, that together with Nowell, there were two others turned out of the House. J. Hales, a layman, in his oration to Queen Elizabeth, presented to her by a nobleman, in the entrance of her reign, speaking of the tyrannicalness of that parliament, has these words: Alexander Nowell, with two other, all three being burgesses for divers shires, and christian men, and all true Englishmen, and lawfully chosen, returned and admitted, were of force put out of the House of Commons; for the which cause, the said parliament is also void, as by a precedent of the parliament, holden at Coventry the 38 Hen. VI. most manifestly it appeareth."

† In 1 Parl. Hist. 457,8, he is called Thomas Haxey, clerk. In 2 Parl. Hist. 53, Sir Thomas Haxey.

the other side, is much weakened by the reasoning of the speaker. He considers clerks and *sheriffs* as alike excluded. Now *sheriffs* have been determined, in modern times, to be capable of sitting in parliament, except for places within their jurisdiction *. Yet much greater authority, and better reasons, can be urged against their becoming members of parliament, than against clergymen; for the writ of election particularly excludes them by name, and their office requires their attendance in their bailiwick. The law favours eligibility; and, therefore, when the authority of these old rules came to be fully weighed and examined, they were held not sufficient to oppose this favouring principle. The Journals contain a resolution of the House of Commons as pointed as any of the forementioned, against the attorney general's seat in the House; and it was for a long time enforced, and is, at this day, unrescinded. Notwithstanding which, the attorney general is regularly a member of the House; and no man ever thought of ejecting him upon the strength of the old resolution.

As to the argument alledged from the state of the convocation, it never was applicable to the case of deacons; and since the change in

* See the cases of Abingdon and Southampton, in 1 and 4 Doug. Elect.

this part of our constitution is not applicable to any of the clergy. Before the time of Edward I. taxes were imposed on the clergy by the authority of the pope. This king, in the 23d year of his reign, summoned them to a convocation by his own authority, at the same time and in the same manner with the parliament; of which, according to the better opinion of antiquarians, they in the beginning composed a part, and not a separate assembly of their own. Afterwards, in consequence of the reluctance of the clergy, to meet under a lay authority, by the immediate summons of the king, (although the clause *Præmunientes* * was continued in the parliamentary writ to the bishops) they were actually assembled under a summons from the archbishop of each province, who received one from the king for that purpose; and not under the authority of

* This clause of a bishop's writ of summons, is in these words; "*Præmunientes decanum & capitulum ecclesiæ vestræ, archidecanum totumque clerum vestræ diocesis, facientes quod iidem decanus & archidecanus in propriis personis suis, & dictum capitulum per unum, idemque clerus per duos procuratores idoneos, plenam & sufficientem potestatem ab ipsis capitulo & clero habentes, unâ vobiscum intersint modis omnibus tunc ibidem, ad tractandum ordinandum & faciendum nobiscum & cum cæteris prelatiis & proceribus & aliis incolis regni nostri, qualiter, &c.*" Gilb. Excheq. 47. Nelson's Rights of the Clergy, 226. & 4 Inst. 4.

the king's writ to the bishop. The stat. 21 Ric. II. ch. 2. plainly shews, that at that time, the proctors of the clergy sat in parliament (C.) The convocation thus assembled, was not so much a spiritual as a temporal institution; intended chiefly for granting aids to the king, jointly with the parliament. Archbishop Wake, in his History of the Church, is of this opinion.

Deacons could not have had a voice in electing the members of this assembly; for the proctors of the clergy were chosen by parsons, vicars, and perpetual curates only*. It is true, the expression of the *Præmunientes* clause is for *the whole clergy*; but they are to appear by two proctors for them. And by the archbishop's summons, under which they met, the archdeacon was required to cite, "Omnes abbates & priores, & præcipuè omnes & singulos ecclesias in proprios usus habentes, rectores etiam & vicarios ecclesiarum, ac alios omnes *beneficiatos* quoscunque," which is the form that Wilkins† has preserved, and under which the assembly of the clergy was held in 1294. This confines it to the beneficed clergy. The cause of their meeting also shews, that it could not have been intended for any but them; for *they*

* 2 Burn, Eccl. L. 24.

† 2 Wilk. Conc. 201.

only had taxes to pay, and therefore they alone were represented. It has been said, that before the stat. 13 & 14 Charles II. deacons might hold livings; but as that statute has entirely altered their situation, no argument drawn from their former state can avail at this day. The virtual representation of women, &c. that has been urged on the other side, does not remove the objection; because deacons could not be the subjects of that taxation, which the convocation imposed; but infants, women, &c. may possess the property from whence taxes are raised by parliament.

So far, the reasoning is confined to deacons: But since that great ecclesiastical revolution which happened in 1664, the whole body of the clergy, whether beneficed or not, as constituent members of the convocation, are exempted from that doctrine of exclusion from parliament, which depended upon the legislative power of the convocation. That power is now radically and effectually gone. Though the form of the writ of summons is still the same, it is now in this respect a dead letter; and has no more effect than that clause in the writ of election, by which *sheriffs* are excluded. It is as nugatory as the name of *King of France* in the royal title of England.

It has been said, that the saving clause inserted in the stat. 16 & 17 Charles II. ch. 1. has preserved the right. Admitting it to be so, no argument upon this question can be drawn from the right, while it is dormant. But from the omission of this clause in the subsequent statutes, and the uniform practice * of 120 years since that period, it may be contended now, not only that the clergy have finally renounced this power of their convocation, but also that it is absolutely passed from them, and extinguished. By the imperceptible operation of that grand constitutional principle, "representation always accompanies taxation," the whole body of the people are at length united in the same rights of society. It is by the working of this principle alone, that the beneficed clergy at this day, have votes for county members, in respect of their benefices. In 1624, there had been a positive resolution of the House of Commons, to prevent their exercising this franchise †; but the

* Gibson refers to another statute in 22 & 23 Chas. II. ch. 3. having the same reservation.

† 28 May, 1 Journ. 714. The whole of this entry, in the Journal, is as follows. A report is made of the election

"For Cambridgehire.—Scholars and fellows of houses, and parsons, vicars, &c. came, and gave voices for knights of the shire—(on which the Committee had)

"Resolved,

the practice was tacitly introduced in company with the parliamentary taxation of the clergy, and became general; and has been since authorised by various acts of parliament; particularly by 10 Anne, ch. 23. sect. 2. & 18 Geo. II. ch. 18. sect. 1. Thus all the reasons depending on the state of the convocation, and particularly the effect of the cases produced on the other side, are inconclusive. The convocation has now no authority, but to make laws binding in matters ecclesiastical; in the same manner as corporations make bye-laws.

The argument deduced from the convocation, by the counsel for the petitioner, is alone an an-

“ Resolved, No scholars or fellows of colleges, halls, &c. having no other freehold, ought to have voice in elections of knights of the shire—

“ Resolved, (*in the house*) Upon question, as at the Committee *supra* :—Nor are to have any hereafter—

“ 2. Resolved, The scholars or fellows having chambers above 40s. yearly value, giveth no voice in elections—Nor are to have any hereafter—

“ He, that hath a chamber, cometh not in by livery and feisin, nor by deed enrolled: No assize lieth: The freehold of it is in the corporation: His fellowship, like wages, and diet, given a servant—

“ 3. Resolved, Parsons, and vicars, &c. ought to have no voice in election of knights of the shire.

“ Resolved, (*in the house*) Also upon question;—Nor are to have any hereafter.”

swer

swer to another argument on the same side, in which it is considered, as an *offence* against the canon law, for a clergyman to sit in parliament. If clergymen were not allowed to sit in parliament, *because* they made part of the convocation, the exclusion did not proceed from any *wrong* committed in the act. But it would be strange indeed, for the same law to consider that to be an offence in the lowest order of the clergy, which it considers as a privilege in the heads of that body. The attendance of the bishops in the House of Lords, was never considered as a degrading interference of that order in secular concerns. Those secular concerns which the canons reprobate, are such as either disgraced the clergy, or were felt as a burthen by them, as mechanical trades or employments, and troublesome offices of no profit. The possession of a voice in the legislature, could never have been included among the former, as appears from the attendance of the bishops there; and in the latter case, the right of objection was a privilege, which might be renounced at pleasure. In the case cited from Levinz and Ventris, it was a *claim of exemption*, which the judges allowed; yet in Levinz's report, the judges are not agreed upon the right; one of them exempting the clerk on that account, and the other for a different reason. Besides, it was in favour of a *beneficed* clerk; and so is the writ in the register

to be understood. Now it is a settled maxim of law "*quisquis renunciare potest juri pro se introducto.*"

The rules of the ecclesiastical law and the canons relating to this subject, must necessarily be understood to have these principles in view, when they prohibit the clergy from secular concerns. As far as they tend to exempt the clergy from the secular jurisdiction, they are to be received with caution, and construed without favour*.

The argument in favour of the exclusion, drawn from the canons, and particularly the 76th, proceeds upon a notion, that a clergyman who disobeys them, would be in a better situation, than one who submits to them. The counsel on the other side must admit, that he who will risk the penalty of excommunication, may exempt himself from their authority. Before the time of the prohibition enacted by the above canon, there was no law to prevent the acts which it prohibits; and, supposing it to extend to the present case, a deacon at the time it passed, might have renounced his function; after which he became as one of the laity: The only difference made by the 76th canon, consists in the

* In 1 Vent. 273, it was said to be the opinion of all the judges, that the clergy were liable to all charges imposed by act of parliament.

danger of excommunication. But there is nothing to prevent a man actually excommunicated, from being eligible to parliament. The house has determined, that outlaws are eligible; between whose state, and that of the excommunicated person, there is not much difference in respect of legal disability. It is a mistake to say, that such person becomes a member by an unlawful act; for the end of the law is answered by a submission to the punishment. After a discontinuance of the clerical function, and the assumption of a lay character, the person becomes to every civil purpose a layman. The sitting member has taken this course, and has, in fact, renounced his clerical character. There being no particular method of form prescribed for the resignation of holy orders, he could not do more.

But the counsel for the petitioner draw a wrong conclusion from the canons, and other regulations of the ecclesiastical law, respecting the two orders of priest and deacon. If they were to succeed in obtaining their own construction of the prohibition, they would fail in proving its application to the order of *deacons*. A deacon is not, in the true sense of the canons, the *minister*, whose conduct is thereby regulated. A *priest* alone possesses that character: The deacon is in a state of probation for the ministry; his office is only a step to, and not

the exercise of that function. This is evident from Can. 32. "Cum ex patrum antiquorum sententiâ & primitivæ ecclesiæ praxi, diaconi officium ad ministerii dignitatem *gradus* quidam sit constitutus; statuimus, &c." and the canon proceeds to direct, that both orders shall not be conferred in the same day: Not that in every case a deacon should be kept from the ministry for a year; but that the bishop may observe, *quales in officio diaconi se exhibuerint, priusquam in ordinem presbyterorum suscipiantur* *.

A deacon has no cure of souls; nor benefice to require his residence upon it, which might cause his absence from other duties, with which that would interfere. But these reasons may have operated in the case of a priest. The additional solemnity in the form of ordination of priests, the additional duties required of, and authority conferred upon them, afford strong evidence of the pre-eminence of their station, and confirm the inference drawn from the foregoing canon.

If therefore a deacon's orders are only a *step* to the ministry, the expression of the canons relating to persons *in* the ministry, cannot affect a deacon. And his office being a state of trial, seems to infer, that a choice is left to the can-

* 4 Wilk. Conc. 385. 3 Burn, Eccl. L. 38.

didate,

didate, either to relinquish it or not, as it may suit him. The whole of the provincial constitution in 1571, taken together, and not as it has been cited in support of the petitioner, is consistent with this opinion. Wilkins, in 4 Conc. p. 265. writes it thus: "*Quivis minister ecclesiæ antequam in sacram functionem ingreditur, subscribet omnibus articulis de religione christianâ in quos consensum est in synodo; & publicè ad populum, ubicunque Episcopus jufferit, patefaciet conscientiam suam, quid de illis articulis & universâ doctrinâ sentiet. Semel autem receptus, &c.*" (*as in p. 281.*)—Here is plainly, throughout, an application to the case of a beneficed clerk alone; for whom rules are prescribed, upon institution and induction to his living.

In addition to the foregoing arguments, it may be observed, that many persons, who were notoriously in holy orders, have sat in parliament, without any man's entertaining a thought of disputing their right to it. Mr. Hatfell * speaks of it as a well known fact of modern practice.

The attempt to revive exploded notions of the ecclesiastical jurisdiction in this liberal age, and in opposition to the favourite legal prin-

* 2 Prec. 10.

ciple of general eligibility, ought to be discountenanced in every shape. It is a maxim in daily use, that all laws inferring penalties or disabilities, should be construed strictly. The present case furnishes a proper opportunity for carrying it into practice.

The counsel for the petitioner observed in reply,

That the main ground of their argument, being the effect of *holy orders* upon the person ordained, it had not been weakened by the reasoning upon the other side, from the actual state of the convocation; because, though that had furnished an objection in the cases mentioned from the Journals, yet it had only been a secondary and not the principal one. That the great division of the people into clergy and laity, was coeval with the origin of our constitution; and the rights and duties of each order, had been so immutably fixed in it, that nothing short of a positive and express law, could alter it; and therefore, whatever change *in fact* might have been brought about by the revolutions in laws and manners, during many centuries, the original principles of the law still continued the same. That it was a part of this our antient law, that no clergyman could engage in those civil duties, which were in their nature separate from and inconsistent with the clerical function;
of

of which nature this office of representative, as they contended, partook.

That the authorities cited, did not shew, that there was any clerical difference between the offices of priest and deacon, as far as either related to the *ministry*; and particularly, that the 32d canon, which was relied upon to prove the deaconry a step to the ministry, had a very different object. It was made to distinguish those two degrees of holy orders more respectfully towards each other; and for this purpose directed, that the same person shall not receive both on the same day; that the dignity of the priesthood may be somewhat raised by the separation: But does not at all affect the office or ministry of a deacon.

That this sacred character could not be put off; for there was no method of voluntary resignation of orders known to the ecclesiastical law, as in the case of resignation of a benefice: And a right derived under that law, must be divested by that law, and by no other. That the sitting member therefore was still a clerk in orders; and to be treated in this question as if entering the house of commons in the habit of his order: Whereas in all those cases, which (it had been said) had of late been frequent, of clergymen sitting in that house, they had taken their seats, as it were, in disguise, and under the
false

false appearance of a lay character, which in reality they had not. That on this occasion, Mr. Rushworth had likewise assumed that appearance, and did not take his seat, or claim to hold it in fact, as a clergyman; (though his counsel had endeavoured to support it on that ground) but by seeming to be one of the laity. But the Committee could not consider him in that character; they must view him merely as a minister of the church.

That a great part of the argument for the fitting member, had proceeded upon a virtual admission (though not *expressly* made by the counsel) that a *priest* was excluded from the house: Yet if they relied upon the position, that whoever could vote for a member of parliament, might be elected, a priest with a benefice might become a member.—Again, they had argued, that a deacon, not being taxable by the convocation, could not belong to that body, or be represented there; and therefore the objection of the convocation could not be urged against him: But by the same rule, a priest without a benefice, would likewise be free from it. That this mode of reasoning passed by the true spirit of the objection, drawn from the convocation; which was, that this assembly represented legally the whole body of the clergy, whether beneficed or not; in the same manner as the House of Com-

mions represented all the freeholders of England, whether possessing 40s. freeholds or less.

That the antient practice in the beginning of parliaments, which had been referred to, of the clergy sitting in them, together with the knights and burgesſes, was too obſcurely treated of in hiſtory, to found any juſt arguments upon; and even ſuppoſing it to be clearly aſcertained, it did not at all ſupport the argument: Becauſe the clergy, when they might ſo appear in parliament, were a ſeparate body of themſelves, unmixed with the laity, and representing their own order only, the ſame as in convocation. Indeed, it was ſtill in ſubſtance the convocation of the clergy; but for purpoſes of convenience, or when matters concerning their own body were brought forward, aſſembled in parliament.

That the ſtatute by which deacons were diſabled to hold livings, could not be conſtrued to *give* them any right which they had not before; and therefore if they were ſubject to excluſion before that law, they were ſo ſtill. Neither could the ſuppoſed renunciation of the rights of convocation, confirmed by the ſtat. 16 & 17 Chas. II. (if it were ſuch) *give* any right to the clergy who may have made it, in prejudice of the laity: Becauſe the laity alone, as the petitioner contends, had the *right* of appearing in parliament at the time of that alteration; and the clergy
could

could not infringe that right by any act of their own.

That there was a wide difference between the cases of a clerk, and that of the attorney general; because the latter depended entirely upon the arbitrary orders of the house alone, who could not of their own authority make an exclusion contrary to the law of the land; as that was proved to have been by an uniform practice to the contrary: But that the case of the clergy was founded in principles of the common law, and confirmed by uniform practice.

The determination of the Committee was expressed in general terms,

That the fitting member was duly elected.

Of which the Chairman informed the house, Feb. 24 *.

* See 40 Journ. 561.

N O T E S

ON THE CASE OF

N E W P O R T.

PAGE 274. (A.) It is curious to observe the different manner in which the Commons have expressed themselves, in different times, upon the subject of disqualification, by attendance in the House of Lords. In the year 1566, (1 Journ. 73) they attended the Lords to receive the Queen's licence to proceed to the choice of a speaker, where one of their members "*moves for the Commons*, that for that Mr. Ric. Onselowe, Esq; solicitor general to the Queen's majesty, was a member of the Lower House, he might be *restored* to join in their election, as burgesses for the borough of Steyning in Sussex. And upon consultation had among the Lords, the said Mr. Onselowe was sent down with the Queen's serjeant at law, Mr. Carus, and Mr. Attorney General, to shew for himself *why he should not be a member* of this House; who alledging many weighty reasons, as well for his office of solicitor, as for his writ of attendance in the Upper House, was nevertheless *adjudged to be a member of this House.*" He was afterwards, on the same day, chosen speaker. The same proceeding was had in 1580, previous to the electing of Mr. Popham, then solicitor

solicitor general, to be speaker : And a committee was sent to the Lords to *demand the restitution* of the said Mr. Popham. 1 Journ. 117. Again, in 1605, (ib. 257) upon a report from the committee of privileges for filling up vacancies, two of the judges are mentioned as members of the House. The question put to the House upon their attendance in the Lords, is, "Whether they shall be *recalled*;" and it is resolved they shall not. These phrases, soon after this period, came to be changed to those of *discharged*, *rejected*, *disabled*, &c. and now, the word which seems to be in general use is, *excluded*. Mr. Hackwell, in the debate referred to in p. 274, takes notice of this change, as it was observed in his time, and accounts for it by saying, as the minutes of his speech represent, "Heretofore, as in Jeffreys's case, (*he was Queen's serjeant in 1575*) there was a strife by the House to increase their number; therefore sent to have Jeffreys remanded. Now the table turned—."

P. 278. (B.) Mr. Hume gives the following account of this affair, in the second chapter (64th of his history) of Charles the Second's reign.

"A great alteration was made this session in the method of taxing the clergy. In almost all the other monarchies of Europe, the assemblies, whose consent was formerly requisite to the enacting of laws, were composed of three estates, the clergy, the nobility, and the commonalty, which formed so many members of the political body, of which the king was considered as the head. In England too, the parliament was always represented as consisting of three estates; but their separation was never so distinct as in other kingdoms.

doms. A convocation, however, had usually sitten at the same time with the parliament; though they possessed not a negative voice in the passing of laws, and assumed no other temporal power than that of imposing taxes on the clergy. By reason of ecclesiastical preferments, which he could bestow, the king's influence over the church was more considerable than over the laity; so that the subsidies, granted by the convocation, were commonly greater than those which were voted by parliament. The church, therefore, was not displeased to depart tacitly from the right of taxing herself, and allow the Commons to lay impositions on ecclesiastical revenues, as on the rest of the kingdom. In recompence, two subsidies, which the convocation had formerly granted, were remitted, and the parochial clergy were allowed to vote at elections. Thus the church of England made a barter of power for profit. Their convocations having become insignificant to the crown, have been much disused of late years."

Lord Chief Baron Gilbert writes thus of the above transaction: After mentioning the last subsidy of the clergy, and that it appeared more advantageous to continue to tax them by land and poll tax, *as it was in the Rump times*, he says, "From henceforward it passed that they should have a vote for members in parliament, *as they had in the Rump times*; and they were taxed as the laity were." *Gilb. Exch.* 56. Burnet, in the first volume of his *History of his own Times*, (p. 197) says, the parliament gave the king four subsidies, "being willing to return to the antient way of taxes by subsidies. But these were so evaded, and brought in so little money, that the court resolved
never

never to have recourse to that method of raising money any more; but to betake themselves for the future to the assessment begun in the war. The convocation gave, at the same time, four subsidies, which proved as heavy on them as they were light on the temporalty. This was the last aid that the spirituality gave." After which, he says, it was resolved in future, on account of the inconsiderable amount, and unequal proportion of the spiritual subsidy, to make one general taxation of them with the laity, "which proved, indeed, a lighter burthen, but was not so honourable as when it was given by themselves. Yet interest prevailing above the point of honour, they acquiesced in it." Rapin relates this event in a few words. Tindal, in his note upon it, after citing Bishop Burnet, adds, "The custom of the clergy's taxing themselves was broken during the late troubles. For then the clergy, either out of voluntary compliance, affectation of popularity, or because they wanted proxies to represent their body, had their benefices taxed with the laity. *This the court found, after the restoration, to be an easier thing, than to have two bodies of men to please; and therefore intended to have deprived the clergy of that right, if they had not voluntarily relinquished it.*" Warner, in his Ecclesiastical History, Vol. II. p. 611, relates, that to encourage their assent, two of the four subsidies, which they had given, were remitted to them, and a saving of the rights to be inserted in the act. It appears from Burnet, that the court had two objects in this scheme; not only to unite the lay and ecclesiastical taxations, but also to get rid of subsidies from both altogether.

In Mr. Hatfell's note, the speaker writes "in consequence of this, (but from what period I can't say) the clergy have assumed, and without any objection, have enjoyed the privilege of voting in the election of members of the House of Commons, by virtue of their ecclesiastical freeholds." According to the Chief Baron's authority, it appears, however, not to have been a consequence of this law; but of the same principle operating, a few years before, in the time of the commonwealth.

I have been the more particular in referring to the different accounts of this revolution in our laws, because of its great importance (according to my observation of it) in our constitutional history. It must afford a pleasing reflection to the minds of all who contemplate the system of our admirable constitution, to observe, in such instances as these, its sure effect and operation, according to reason and justice; producing its beneficial changes in silent and gradual progress, like the working of Nature herself, from fixed and unseen general principles. A writer of practical law, who was contemporary with the civil war and restoration, mentions the right of clergymen to vote in county elections for their spiritual livings, as a point established in the last century. See Dalton's Sheriff, p. 334: Although this work was composed, perhaps, less than 40 years after that positive resolution of the House of Commons (mentioned in p. 297) to the contrary.

P. 294. (C.) Dr. Hody, in the second part of his History of Convocations, from p. 371 to p. 430, has shewn many instances in which the whole body of the

the clergy antiently made one assembly, and sat together with the parliament. It appears, however, that as often they did not, and made a separate convocation by themselves. In p. 393, he controverts observations of Selden and Lord Coke *, as to the sitting and voting of the inferior clergy by their proctors *in parliament*; both those authors asserting, that they were assistants only, and not members of it. It seems to me, upon reading the instruments and authorities recited by Hody, (in p. 410 and following) that this opinion, and the opposite to it advanced by the latter, are both true, according to the subject matters of deliberation in parliament. For cases are mentioned by him, in which the parliament considered the assent of the clergy to be necessary to render their acts valid; and others of merely secular concern, in which the clergy themselves seemed to act upon a notion that they ought not to intermeddle. Hody concludes his second part (p. 431) thus: "Upon comparing all things together, I take the *Præmunientes* to have been continued in the writs, after it became a constant custom for the clergy to meet in a separate body, by virtue of the archbishop's mandate, that thereby our kings might assert their right of calling the clergy (if they please) to *parliament*; which the clergy opposed as an invasion and inroad upon their liberties." If the reader wishes to learn more upon this subject, he may read; with much satisfaction, Lord Chief Baron Gilbert's fourth chapter of his Treatise on the Court of Exchequer, which contains an excellent general history of the institution of convocations in England.

* See 4 Infl. 4.

He follows the opinion of Archbishop Wake, whose history of the State of the Church he cites and refers to. In that work there is a chapter, the produce of much reading and well digested, to prove that the antient parliamentary convocation of the clergy, by the *præmunientes* clause, and the convocation by the archbishop's summons under the king's writ to him, were different assemblies, in rights, powers, and privileges. This, among other points, was denied by his opponent Atterbury; and one cannot wonder, that two learned men, of different parties, should form different opinions of the rights and authority of an institution, subsisting in different forms under the same name, in remote antiquity. The work of the latter is written with more of the warmth and acrimony of dispute than the former; and he is, therefore, to be more cautiously attended to in his positions. He wrote in support of the privileges of the Lower House of convocation, in whose cause he engaged with violence. Dr. Wake maintained the authority of the Upper House. The seventh chapter of Dr. Atterbury's book on the Rights of the Convocation, in the latter part, contains a recital of many antient records upon the subject.

Burnet, in the 2d volume of his History of the Reformation, has published three curious papers * upon this question. The first is a petition of the Lower House of convocation, in the beginning of the reign of Edw. VI. to the Higher House, the second article of which is in these words: "Also, that according to the antient custom of this realm, and the tenour of the king's

* N^o 16, 17, and 18, of the first book of his Collection of Records.

writ, for the summoning of the parliament, which be now and ever have been directed to the bishops of every diocese, the clergy of the Lower House of the convocation may be adjoined and associate with the Lower House of parliament; or else, that all such statutes and ordinances, as shall be made concerning all matters of religion and causes ecclesiastical, may not pass without the sight and assent of the said clergy." The second paper is another petition in the same reign, renewing and enforcing the same request. The third is a paper offered to Queen Elizabeth, and afterwards to King James, for the same purpose. It is intitled, "*Reasons to induce her Majesty, that deans, archdeacons, and some other of her grave and wise clergie, may be admitted into the Lower House of parliament.*" The 4th, 5th, and 6th articles, are as following: 4th, "It doth not appear why they were excluded; but, as it is thought, either the king offended with some of them, did so grievously punish the whole body; or else the ambition of one of them, meeting with the subtlety of an undermining politic, did occasion this causeless separation.

5th. They are yet, to this day, called by several writs, directed into their several diocesses, under the great seal, to assist the prince in that high court of parliament.

6th. Though the clergy and the universities be not the worse members of this commonwealth, yet, in that respect, they are, of all other, in worst condition; for, in that assembly, every shire hath their knights, and every incorporate town their burgeses; only the clergy and the universities are excluded."

The

He follows the opinion of Archbishop Wake, whose history of the State of the Church he cites and refers to. In that work there is a chapter, the produce of much reading and well digested, to prove that the antient parliamentary convocation of the clergy, by the *præmunientes* clause, and the convocation by the archbishop's summons under the king's writ to him, were different assemblies, in rights, powers, and privileges. This, among other points, was denied by his opponent Atterbury; and one cannot wonder, that two learned men, of different parties, should form different opinions of the rights and authority of an institution, subsisting in different forms under the same name, in remote antiquity. The work of the latter is written with more of the warmth and acrimony of dispute than the former; and he is, therefore, to be more cautiously attended to in his positions. He wrote in support of the privileges of the Lower House of convocation, in whose cause he engaged with violence. Dr. Wake maintained the authority of the Upper House. The seventh chapter of Dr. Atterbury's book on the Rights of the Convocation, in the latter part, contains a recital of many antient records upon the subject.

Burnet, in the 2d volume of his History of the Reformation, has published three curious papers * upon this question. The first is a petition of the Lower House of convocation, in the beginning of the reign of Edw. VI. to the Higher House, the second article of which is in these words: "Also, that according to the antient custom of this realm, and the tenour of the king's

* N^o 16, 17, and 18, of the first book of his Collection of Records.

writ, for the summoning of the parliament, which be now and ever have been directed to the bishops of every diocese, the clergy of the Lower House of the convocation may be adjoined and associate with the Lower House of parliament; or else, that all such statutes and ordinances, as shall be made concerning all matters of religion and causes ecclesiastical, may not pass without the sight and assent of the said clergy." The second paper is another petition in the same reign, renewing and enforcing the same request. The third is a paper offered to Queen Elizabeth, and afterwards to King James, for the same purpose. It is intitled, "*Reasons to induce her Majesty, that deans, archdeacons, and some other of her grave and wise clergie, may be admitted into the Lower House of parliament.*" The 4th, 5th, and 6th articles, are as following: 4th, "It doth not appear why they were excluded; but, as it is thought, either the king offended with some of them, did so grievously punish the whole body; or else the ambition of one of them, meeting with the subtlety of an undermining politic, did occasion this causeless separation.

5th. They are yet, to this day, called by several writs, directed into their several diocesses, under the great seal, to assist the prince in that high court of parliament.

6th. Though the clergy and the universities be not the worse members of this commonwealth, yet, in that respect, they are, of all other, in worst condition; for, in that assembly, every shire hath their knights, and every incorporate town their burgeses; only the clergy and the universities are excluded."

The

The 4th article, when presented to King James, was thus varied, "It is thought the clergie, falling into a *præmunire*, and not in the king's protection, it did afterwards please the king to pardon them, but not to restore them; so began this separation as far forth as can be collected. Then the wisdom of a great politician, meeting with the ambition of as great a prelate, wrought the continuance of the said separation, under this pretence, that it should be most for the honour of him and his clergy, to be still by themselves in two assemblies of convocation, answerable in proportion to the two houses of parliament."

The 13th and 14th articles are thus: 13th. "In the mean time, (which God in mercy grant may be for many generations) her majesty shall be sure of a number more in that assembly, that ever will be most ready to maintain her prerogative, and to enact whatsoever may make most for her highness' safety and contentment; as the men that, next under God's goodness, do most depend upon her princely clemency and protection.

14th. It would much recover the antient estimation and authority of that assembly, if it might be increased with men of religion, learning, and discretion; which now is somewhat imbas'd by *youths, servingmen, and outlaws*, that injuriously are crept into the honourable House."

We may infer, from the Queen's not accepting this offer of implicit obedience from her loyal clergy, that she thought her authority too firmly established to require their support; a most fortunate circumstance for the liberties of this nation,

Burnet

Burnet * writes of these petitions, that he had never met with any good reason to satisfy him of the justice of this claim. " There was a general tradition in Queen Elizabeth's reign, that the inferior clergy departed from their right of being in the House of Commons, when they were all brought into the *præmunire* upon Cardinal Wolsey's legatine power, and made their submission to the king. But that is not credible ; for, as there is no footstep of it, which, in a time of so much writing and printing, must have remained, if so great a change had then been made ; so, it cannot be thought, that those who made this address but 17 years after that submission, (many being alive in this, who were of that convocation ; *Polidore Virgil* in particular, a curious observer, since he was maintained here to write the History of England) none of them should have remembered a thing that was so fresh, but have appealed to writs and ancient practices. But though this design of bringing the inferior clergy into the House of Commons, did not take at this time, yet it was again set on foot, in the end of Queen Elizabeth's reign, and reasons were offered to persuade her to set it forward ; which not being then successful, these same reasons were *again offered* to King James, to induce him to endeavour it. But whether this matter was ever much considered, or lightly laid aside, as a thing unfit and unpracticable, does not appear ; certain it is, that it came to nothing. Upon the whole matter, it is not certain what was the power or right of these proctors of the clergy in former times : Some are of opinion, that they were

* Vol. II. p. 48.

only assistants to the bishops, but had no voice in either House of Parliament. This is much confirmed by an act passed in the parliament of Ireland, in the 28th year of the former reign, which sets forth, in the preamble, "That though the proctors of the clergy were always summoned to parliament, yet they were no part of it; nor had they any right to vote in it, but were only assistants in case matters of controverſie or learning came before them, as the convocation was in England; which had been determined by the judges of England, after much enquiry made about it. But the proctors were then pretending to ſo high an authority, that nothing could paſs without their conſents; and it was preſumed they were ſet on to it by the biſhops, whoſe chaplains they were for the moſt part: Therefore they were, by that act, declared to have no right to vote." From this ſome infer they were no other in England; and that they were only the biſhops' aſſiſtants and council." Burnet himſelf does not agree with this opinion, and refers to the ſtat. 21 Rich. II. ch. 2. and the practice of thoſe times, when the whole parliament formed but one aſſembly; at which time he thinks the inferior clergy made a part of that body; and that when the two Houſes of Parliament divided, the aſſembly of the clergy divided alſo into a ſimilar form, which it has borne ever ſince.

The act of 21 Rich. II. to which Burnet refers, (and the argument in p. 294) repeals a commiſſion of regency, which the king had been prevailed upon to grant in a former parliament. It is paſſed at the requeſt of the Commons, "*by the king, with the aſſent of all the lords ſpiritual and temporal, and the proctors*
of

of the clergy." The same stile is repeated in a more extraordinary form in chap. 12 of the same statute, in the following words, (after reciting the treasonable proceedings of the parliament in 11 Rich. II. whose acts they were about to repeal) "*Et sur ceo les Seignurs espirituelles & temporeles et les procureurs de la Clergie severalmment examinez assenterent, &c.*" And in the next sentence, *the Commons* are added. In the enacting part, towards the conclusion, the words are, "*Sur quoi par le roy de l'assent des Seignurs espirituelles & temporels & les procureurs de la Clergie & de les ditz Communes & par advys de les justices & serjeants susdites, &c.*" I do not find the proctors of the clergy, named in any other acts of this parliament, nor in the general preliminary title, which is in the usual form; nor are they mentioned in the stat. of Henry IV. by which the acts of 21 Rich. II. were repealed. It is certainly a singular stile; and, perhaps, not to be found in any other statute. It is plain that the proctors of the clergy, here mentioned, were as much a separate body from the rest, as the Commons from the Lords. The statute 8 Henry VI. ch. 1, by which the members of convocation are allowed the privilege of parliament, in the same manner as the Lords and Commons, proves, by their not having it before, that they had not been considered as any essential part of the parliament.

In the second volume of the Parliament Rolls, p. 368, in the 51st year of Edw. III. N^o 46, there is a petition of the Commons to the King, which shews their extreme jealousy of the interference of the clergy. It is in these words: "ITEM, *Que null estatut ne ordonnance*

denance soit fait ne grante au petition du clergiz, se ne soit par assent de vos communes. Ne que vos dites communes ne soient obligez par nulles constitutions q'ils font pur leur avantage, sans assent de vos dites communes. Car eux ne veullent estre obligez a null de vos estatuts ne ordenances, faitz sans leur assent."

The King's answer to the above petition is entered thus :

" Responsio, Soit cest matire declaree en especial."

XI.

THE

C A S E

Of the BOROUGH and HUNDREDS of

C R I C K L A D E,

In the County of WILTS.

VOL. II.

Y

The Committee was chosen on Monday, February 14,
1785, and consisted of the following Members:

Peter Johnston, Esq; *Chairman.*

John Moore, Esq;

Brook Watson, Esq;

Joshua Grigby, Esq;

Sir James Duff, Bart.

Thomas Hunt, Esq;

Sir William Moleworth, Bart.

William McDowal, Esq;

Edmund Nugent, Esq;

James Martin, Esq;

William Middleton, Esq;

John P. Bastard, Esq;

Sir William Mansell, Bart.

NOMINEES.

John Galley Knight, Esq; *Of the Petitioners.*

John Nicholls, Esq; *Of the Sitting Members.*

PETITIONERS.

John Walker Heneage, and Robert Nicholas, Esqrs.
and certain Electors of the Borough in their Interest.

Sitting Members.

Charles Westley Cox, and Robert Adamson, Esqrs.

COUNSEL.

For the Candidates Petitioners,

Mr. Batt, and Mr. Milles.

For the Electors,

Mr. Douglas.

For the Sitting Members,

Mr. Graham, and Mr. Le Blanc.

For the Returning Officer.

Mr. Charles T. Morgan.

T H E

C A S E

Of the BOROUGH and HUNDREDS of

C R I C K L A D E.

THE petitions alledged, that at the late election, many unwarrantable practices were made use of by the sitting members, to procure a colourable majority in their favour : That Richard Townsend, the bailiff, and returning officer, before the poll, used undue influence to prevail upon persons, who had no right of voting, to tender their votes for the sitting members ; giving them reason to believe, that he would admit them to poll at all events : That during the poll, he behaved with marked partiality to the sitting members, and illegally and arbitrarily admitted many persons to vote for them who had no right, and rejected many who were duly qualified on the part of the petitioners : That he attempted, by various other illegal means, to procure a fraudulent majority for the sitting members, and admitted all persons

Y 2

with-

without inquiry, to vote for them, and discouraged all inquiry into the rights of such persons. ‡

That the sitting members were guilty of bribery, by giving and promising money, and other rewards, to corrupt the voters to vote for them †, and that in consequence thereof, and of the partiality of the bailiff, the sitting members obtained a colourable majority in their favour; under which the bailiff had endeavoured to protect himself in the illegal return he had made, in prejudice of the petitioners, who had the majority of legal and uncorrupted voters, and ought to have been returned.

The petition of the electors contained the same charges as the foregoing *.

The borough of Cricklade derives its rights from prescription; the particulars of which may be seen in Mr. Douglas's history of a former election there, in his 4th volume. The right of voting was determined by the select Committee, who tried that election to be "in the inhabitants possessing houses within the borough, who are freeholders, copyholders, or leaseholders, for any term not less than three years; or for any such term, or greater term, determinable on life or lives: Such freeholder, copyholder, or leaseholder, having been in the occupation of

† There was no proof of this charge offered.

* 40 Journ. 20, 92.

the house, for which he may claim to vote 40 days preceding any election *."

The above determination was made in 1776, upon the trial of the election which happened in 1775; in consequence of a dispute between the parties, about the particular qualifications of the right; upon which a great deal of evidence was produced.

At the general election in 1780, Paul Benfield, John M'Pherson, and Samuel Petrie, Esqrs. were candidates for this borough. The two former were returned, but the latter petitioned against them. Upon the trial of this petition, in the beginning of 1782, Mr. Benfield alone preserved his seat, and Mr. M'Pherson's was declared void. The subject of that trial was bribery; which appeared to the Committee to have been so heinous, and so generally practised in the borough, as to require some signal and extraordinary punishment. Under the authority of their resolutions and report to the house, a bill was there introduced, for preventing bribery and corruption in future elections in Cricklade; and was passed into a law, the statute 22 Geo. III. ch. 31. The legislature considered, that the electors had, by their corruption, rendered themselves unworthy of their pri-

* 4 Doug. Elect. 65.

C A S E X I.

vilages, and that it was proper to change the constitution of a town, in which this crime had taken such deep root. This was the design of the act above-mentioned; the effect of which is, not to take away the subsisting right of election in the borough; but to purify and amend the exercise of it, by mixing with the inhabitants of the town, the county-freeholders of the five adjoining hundreds; to whom (subject to the rules of county elections) this act gives an equal right in electing the members for Cricklade.

The election next after the passing of this act, happened in June 1782; when the hon. George Richard St. John, the present sitting members, and Samuel Petrie, Esq; were candidates to supply the place of Mr. M^cPherson. The contest at the poll was only between Mr. St. John and Mr. Petrie; the other two having previously declined. The election was decided by a great majority in Mr. St. John's favour, but Mr. Petrie petitioned against him *. This petition was not tried during the session in which it was presented; was renewed † in the following, but soon after withdrawn ‡.

The present election is the second, in which the new body of electors have had an oppor-

* 38 Journ. 1129. † 39 Journ. 28. ‡ 39 Journ. 175.

tunity of exercising their franchise. It took place on Thursday the 8th of April, 1784: The petitioners and sitting members, and likewise Mr. Petrie, being candidates. At the close of the poll on the Tuesday following, the numbers were for

Coxe	-	442
Adamson	-	435
Heneage	-	373
Nicholas	-	358

Coxe's majority being 69, and Adamson's 62, over Heneage: And the former's 84, the other's 77, over Nicholas. Petrie had declined before the election day.

By the opening of the petitioners' case to the Committee, it appeared that they relied upon two separate heads of objection to the sitting members.

The first was, a general charge against the returning officer, for gross misbehaviour and partiality in conducting the election; to which alone they imputed the illegal return of the sitting members.

The second, an endeavour to reduce their numbers on the poll, by general and particular objections to the votes, so as to give themselves a great majority. They proposed to strike off 136 of their borough votes and 20 hundredors; and to add 10 rejected votes to their own poll;

so as to reduce the number for their opponents 166 in the whole. They objected to 32 of the first class, who claimed to vote as leaseholders, either for having fraudulent leases or none at all: To some as non-resident 40 days; to others as inmates, or having split tenements; and to 40 as parish poor: Besides other particular objections. The objections to the hundredors were various; but chiefly for not being duly assessed to the land-tax, according to stat. 20 Geo. III. ch. 17.

The petitioners began with evidence upon the first head, and called, as witnesses, two gentlemen, who attended the election as their agents. They related the following circumstances.

A few days before the election, the bailiff of the borough (who is the returning officer) was applied to by the counsel for the petitioners, to erect booths in two or three places, for the accommodation of the freeholders; who, it was apprehended, might arrive in great numbers to poll; the usual polling place not being convenient, since the increase of the electors. Townsend, (the bailiff) answered, that it was not usual, and he did not think it necessary. This application came from the petitioners *ex parte*.

Counsel for each party attended the poll. On Thursday, April 8, the election day, before the poll opened, it was agreed on all sides, that it should

should begin at nine and close at four o'clock each day. Townsend, at that time declared, that he would not receive one of the town voters till all the hundredors had polled. On this last article, the candidates had made no agreement or proposal to him or each other.

On this day, the poll not having commenced till after 12 o'clock, and a large body of hundredors having come into the town to vote, it was proposed to the bailiff, on the part of the petitioners, to continue the poll for that day, till eight o'clock in the evening, for their accommodation. This he refused; and, in consequence of it, above a hundred freeholders, intending to vote for the petitioners, were obliged to leave the town, much to their inconvenience, without voting.

On the Saturday following, before the poll began, it was proposed, as the wish of both parties, that the poll should not close for that day at four, as usual, but be adjourned for two hours, and then open again for the convenience of many freeholders of both sides, (but more particularly on the part of the petitioners) who were obliged on that day to attend Marlborough market, and could not return till the evening. Townsend agreed to this; and said, that if no freeholders should come in the evening, he would then only go to the hall, as matter of form, to adjourn

adjourn the poll to Monday. Both parties agreed to it. After dinner, the bailiff, with Mr. Myers, a friend of his, came to the agents for the petitioners, and asked "if their freeholders were come." Being told, that they were not, the bailiff and Myers said, "it would then be useless to keep the poll longer open, and they would go and adjourn it." They accordingly went away; but, in a few minutes after, advice was brought from the hustings to the agents, that the bailiff was there, carrying on the poll as usual, and receiving borough votes. Upon this alarm, they ran to the hall, where they found a great crowd of borough voters, and one of them polling. The counsel for the petitioners was there, and charged the bailiff with a breach of his engagement, requiring him to adjourn the poll. A long altercation ensued. Townsend wanted to proceed: Said he would not sit there to do nothing; and told the agents it was all a farce to wait longer for their freeholders, as he believed their stock was quite exhausted, and that they had no more to poll. In this confusion two hours were spent; at the beginning of which, two borough voters were received, and no other business was done: At last the poll was adjourned to Monday. On that day 90 freeholders polled, and 30 on Tuesday; on which day the poll finally closed.

The

The agents for the petitioners, from the beginning, wished to have had the borough votes taken promiscuously, so as not to have created delay by their separation from the others; and on the second day, Friday, applied to a friend of theirs of that class, residing in the town, to go to vote on that day, in the hope of inducing the bailiff to take the town votes in common with the others. This voter went accordingly to the hall; where Townsend, who knew him to be a freeholder as well as a burges, told him, that if he intended to vote as a burges, he would not then take his vote, for he was not yet come to them; if he chose to vote as a freeholder, he might. The voter then polled as a freeholder, and went away. Townsend, at that time, as he had done often before, declared, that he would not poll the burgeses till all the hundredors had voted. Till Saturday, the numbers on the poll for the two parties, were nearly equal. On Monday morning, though there were freeholders sufficient to employ the greatest part of the day unpolled, he began regularly to take the burgeses, a great majority of whom were on the side of the sitting members. Before any had polled, the counsel for the petitioners told him, that he claimed a right to examine all the borough voters, as to the particular interests and titles under which they might come to vote; and,

and, in particular, that where any should claim as leaseholders, he should require the lease to be produced. At the same time he read to the bailiff, the resolution of the select Committee of 1776, upon this subject, which is recited in 4 Doug. Elect. 70, in these words: "That any deed upon which a voter claims to vote, such vote being objected to by the parties, must be produced to the Committee; or proof given, that such deed is unduly withheld or lost, before the Committee can admit other evidence, as sufficient to substantiate the vote."

Many of this class of voters, when asked by the counsel for the petitioners, at the poll for their leases, applied to the bailiff for advice, who uniformly told them, they need not produce them; and to several, said, that he himself knew them to be good votes. The same happened when questions were put upon other circumstances of the voters' titles. One who claimed as a leaseholder, having refused, in this manner, to answer questions from the counsel, and, in particular, to say how long he had had his lease, was asked by Townsend, if he had had it an hour, he answered, "Yes—several hours;" upon which the bailiff declared, that if a lease were brought to the poll, with the seal hot, he would receive the vote; for such was the right of election at Cricklade.

Another

Another of this class, questioned and objected to by the counsel for the petitioners, said he had lived in the house, for which he voted, a year and a quarter, and *supposed* he had a lease from the beginning, but had never had it in his possession. The bailiff admitted his vote.

A voter for the sitting members was objected to as one of the parish poor; (he was the first to whom that objection was made) and a person present told Townsend, that he must know the fact, as he had given him the relief himself. Extracts from the parish book, made by the petitioners' agent, were also offered to the bailiff, to prove the objection; and the agent offered to swear to the truth of the extracts. Townsend did not ask for the book, or the extracts from it; but, hereupon, the counsel on the other side insisted upon the necessity of producing the book *itself* for this purpose, as the best evidence; in which opinion the bailiff coincided, and admitted the vote. The same reason served him for the admission of all those, (and the number was considerable) to whom this objection was made, except one; whom he rejected, because, he said, he knew him to be one of the weekly poor. On the part of the petitioners, notice had not been given to the parish officers to produce their books at the poll.

Townsend,

Townsend, who kept a chandler's shop in Cricklade, was employed by the parish officers, in many instances, to give relief in kind to the poor, from his shop, and made out his bill to the parish for it.

The burgesses, on the side of the petitioners, were not questioned respecting their titles, by the counsel for the sitting members.

The bailiff was seen frequently, during the election, in company with the sitting members, and going in and out of their house : And the poll clerk, appointed by him, used often to take the poll book to the same house.

With respect to the hundredors, the petitioners did not complain of the bailiff for similar misconduct as to *their* polling. A great majority of them were for the petitioners.

One of the witnesses who gave the above account of the bailiff's conduct, said he believed that he generally followed the advice of Mr. Myers, who is an attorney, in his decisions ; who was commonly at his side during the poll : And that the latter advised him to the best of his judgment.

During the trial of this election, Mr. Myers attended the Committee as one of the agents for the sitting members.

The above circumstances were the subject of the complaint made by the petitioners against the

the returning officer. Their counsel relied much upon them; and argued, That his conduct had been highly criminal, and deserving severe reprobation—That it shewed a partial abuse of his authority, in order to injure the petitioners. That his refusal to erect booths for the poll, proceeded from a design to tire out and vex the hundredors, (a majority of whom were for the petitioners) by a long and troublesome election. That his intended separation of the two classes in polling, shewed a corrupt endeavour to raise the importance of the town votes, in turning the election to the side which he favoured. That his behaviour at the poll, and particularly in respect of the town votes, was an indecent, as well as illegal, exercise of his office. And they urged the Committee to take proper measures for punishing him, either by their own censure, as in the case of Sudbury*, or by a report to the House, as they should think proper.

In the opening of the cause, they stated, that they should consider themselves intitled, after proving the above misbehaviour of the bailiff, to throw the burthen of proof, as to the merits of the case, upon their opponents; and oblige them to bring evidence in support of their majority: Because, if the returning officer had done

* See 2 Doug. Elect. 173.

his duty in the election, their clients must have been the sitting members; and it would be but equal justice that they should retain this station in the conduct of the cause, if they should feel any disadvantage from that mode of proceeding, to which his conduct had driven them. But they said, they thought it would be more convenient for the Committee, and their own clients, to wave this advantage, in the first instance, and to proceed as in other cases; reserving, however, the benefit of this claim, if, in a subsequent stage of the trial, they might think proper to resort to it. As, for example, if the sitting members should be able to restore any of those votes whom they should impeach, they would, in such case, insist upon this point.

In this manner they entered upon their evidence; and, after examining the two witnesses beforementioned, proceeded to others upon the merits of the election.

It was agreed between the parties, to treat the whole case respecting the borough votes first and separately, in order to obtain a decision upon it from the Committee: Because if the petitioners should succeed in that, there would be a majority on their side, so great, as to make any further inquiry useless. In this proceeding 12 days were employed; in the course of which, they had given evidence to disqualify (as they

contended) 122 votes; of whom 115 were for Cox, and 112 for Adamson, besides 13 cross-votes. The counsel for the sitting members then entered upon their case, in answer to the other. But in the course of their opening, having treated the case as if the petitioners had relinquished the point, for which at first they reserved their claim, respecting the mode of proceeding; and having proposed to call evidence, in support of such votes only, as had been impeached by particular evidence on the part of the petitioners, or whose declarations at the poll had been falsified, the counsel for the latter interposed. They said,

They had never given up the point they contended for; that the silence of the other counsel, and of the Committee respecting it, had led them to suppose that the justice of it was admitted: For they still insisted upon it as a material substantive point, "that the conduct of the returning officer had been so grossly partial and corrupt, as not only to call for punishment as a public offence, but likewise to intitle them to those advantages of situation in this cause, which they would have had as sitting members; of which place his guilt alone had deprived them." And they now required to have this question decided by the Committee, conformably to the practice in the cases of Car-

digan and Coventry. That they had avoided this course at the beginning, in the hope that the Committee would, of themselves, have interfered as in the case of Coventry, in behalf of the petitioners in this respect; and because they thought they could establish their case more fully to the satisfaction of the Court, by proceeding regularly through it. That the court should consider themselves as fitting to do that justice, which the bailiff ought to have done; and therefore, as the voters in question ought not to have been admitted by him, without shewing their titles, the Committee ought now to call upon the sitting members to produce them, in order to keep their places on the poll.

The counsel on the other side contended,

That those for the petitioners, by their conduct, had waved their argument and the effect of their claim; that it was too late to recur to it, after having proceeded regularly through their case, and concluded it: That it would be unjust now to confound the order of proceeding; for if at first the question had been agitated and determined against the sitting members, they would have accommodated their case to their change of situation; and might have had the advantage, which the petitioners had, of bringing forward their case *first*, and of replying to that made against them: Whereas, after what
had

had passed, the proceeding called for, would give the petitioners the advantage of both situations.

After more debate of this kind, the Chairman desired the counsel on each side, regularly to argue the point in dispute, to enable the Committee to determine it with precision.

The particular subject of this interruption, related to those voters for the sitting members, who, at the poll, refused to produce their leases, or to answer the questions respecting their titles to vote. The counsel for the petitioners had given no other evidence as to several of them, than that general account of their behaviour at the poll; which, they contended, was sufficient, connected with the other circumstances, to require the sitting members to establish their titles, by producing their leases.

They now argued to the following effect :

If the returning officer had done his duty, he would have required some satisfactory general evidence of the rights of the voters objected to at the poll; if he had asked for this evidence, he would have been bound in duty to reject so many of them, as would have left the petitioners a clear majority on the poll. He could not have acted thus from ignorance, because his whole conduct taken together betrays a corrupt motive. So far from using his authority

to obtain a fair account from the voters, he did all in his power, by coming forward actively, to suppress inquiry, and to encourage them to withhold the information necessary. When they asked him for advice, he advised them wrong; for such was his answer to them, "that they were not obliged to shew their titles."

In all cases some evidence of a voter's right must be produced, whatever may be the nature of the election: By this it is not meant, that in all cases title deeds, or legal proofs, are to be established; but *some* proof is to be given if required. In counties, as long as elections have been regulated by positive law, this has been left to the freeholder's oath, as the most expedient method of ascertaining the truth.— In boroughs, although their parliamentary constitutions are so various, as hardly to be reduced into regular classes, yet in all, the law has provided some means of ascertaining the voters, and of supplying the place of a register. There are three general divisions, which in this point of view, comprehend them all; as 1. The right corporate: 2. That from scot and lot: 3. That from estate. In the first sort, the books of the corporation contain such proof of the claim, as is here intended, i. e. such as *primâ facie* is sufficient. In the second sort, the books of the parish rates, contain a similar proof. In the third

third fort, in which no public instrument can be referred to, as in the two former instances, the voters must supply the proof from their own documents; and without it, a returning officer is not bound to receive a vote, if questioned.

The two cases of Cardigan in 1775, and Coventry in 1781, have enforced the above doctrine in a signal manner. In the former *, the mayor had declared, that he would admit all voters who would *say* they had voted at the former election. In that former election, the candidates had agreed to take all voters that came from the contributory towns, and to question their rights afterwards by a scrutiny, if it should be necessary; but no such scrutiny was afterwards had; so that the having voted at this election, could form no rule to judge by. In this manner, an immense number of persons, without any right whatever, were admitted to vote. When the merits of this election came on afterwards to be tried upon a petition, the sitting member (like those now for Cricklade) claimed the benefit of his possession of the seat, and insisted upon the petitioner's bringing evidence to impeach his votes. But the Committee considered a poll so taken, as having no legal effect, and called upon the sitting member, to shew

* See the case in 3 Doug. elect. 182—186.

some evidence of the right of voters so irregularly received *: In which failing, the petitioner succeeded to his seat.

In the case of Coventry, after the election in 1780, at the end of a poll which was protracted to six weeks, the corporation in a night had admitted to the freedom about 200 burgesses, who were brought to poll the next morning, for the parties who by their votes became the sitting members. The petitioners, in the trial afterwards, gave general evidence of the fact; and on the third day of their proceeding, the Committee, of their own accord, stopped the counsel, and told them, they were of opinion that these men came upon the poll so questionably, that the party for whom they voted, should prove their right in the same manner as if they had not stood upon the poll.

These are cases in point for the petitioners in the present question. And as none of those burgesses of Cricklade, who voted for the sitting members, brought any evidence of their titles to the poll, the court ought, upon the principle of those cases and the rules of justice, to call

* The counsel in that case, perhaps, understood the Committee to be of this opinion; but in the history of the trial, it does not appear, that any resolution of this sort was expressed by the Committee; for the sitting member's counsel, of their own accord, entered upon this evidence.

on them now for such evidence. There is likewise an additional reason to be adduced from a precedent on record, which shews this to have been the particular practice of Cricklade. In the case in the Journals, in 1689, (10 Journ. 72. col. 2.) it appears, the voters used to produce their leases to the bailiff; the same in the case in 1695; (11 Journ. 461.) and the witness whose evidence is related, in 4 Doug. elect. 44. speaks of the practice as customary.

The practical rule of law, *melior est conditio possidentis* has not place, in a case like this. It applies only to those of merely private rights, where one person has the property of another, and has acquired a presumptive right to it, by his negligence or sufferance. In such cases, the law, for public convenience, considers a possession so acquired, to be rightful, till proof of the contrary. But here the voters have gained their station, not only by wrong, but by the wrongful act of a third person, a legal officer, without any negligence of the opposite party; and therefore have not that possessory right to which the maxim applies. It is like the case of a forcible entry into land; where, if an ejectment were brought, the possession would be considered as no possession at all: But the judge would require a further proof of title, from the party who should claim this advantage from it.

The counsel for the sitting members argued as follows :

There has been much inconsistency in the conduct of the petitioners, in spending so much time in evidence of facts, for which, as they say, they might have called on their opponents in the first instance. If they were sincere in their claim, it is difficult to account for their not insisting upon it then, when their success in it would have been so essentially serviceable to their cause. With respect to the bailiff's conduct, the sitting members are not charged with partaking in it, and therefore they ought not to suffer from it, even supposing it to be criminal ; and as to the officer himself, the evidence shews, that he acted by the advice of one, whom he might well have thought capable of directing him, and who is said to have advised him to the best of his judgment. But it is not to rest on this general observation : To every one of the charges brought against him, his defence may be easily made. As to the first, of refusing booths for polling—He had no power to erect them. It is misleading the court, to make *this* a head of accusation. Even in counties, the sheriff had no such power, and the election must have been held in the usual place in *them*, before the stat. 18 Geo. II. ch. 18. s. 7. which impowers and directs sheriffs to make use of them.

His

His declaration of his intent to keep back the burgesſes, till all the freeholders ſhould have polled, was prudent, and in order to avoid confuſion: His breach of it afterwards was accidental; for the poll being open by agreement that afternoon, and no freeholders attending, he could not of himſelf reſuſe the votes of the burgesſes who came and demanded to vote. Finding it oppoſed ſtrenuouſly by the counſel, he deſiſted; and in concluſion, only two votes were then received. So that the inconvenience of this to the petitioners, muſt have been trifling.

As to the paupers; their caſe is ſo particularly circumſtanced, and ſo different from the common caſe of pariſh poor, that he would have acted unwiſely, to have taken on himſelf to reſuſe their votes. It remains to be decided by the Committee, whether they will not ſtill continue upon the poll with their approbation, after the arguments they will hereafter hear in ſupport of them.

As to his conduct reſpecting the leaſehold voters, the accuſation ſuppoſes, that he admitted them without *any* inquiry into, or evidence of their titles; and that in all claſſes of votes, a returning officer has ſome regular evidence of title ſhewn him; which in this inſtance the bailiff evaded. The firſt of theſe poſitions is contrary to fact, and the ſecond to law. The perſons

sons who voted under this description, lived in the houses for which they voted; this was known to the bailiff, and not disputed; and it was *primâ facie* evidence of some lease and right of possession in the voters, which authorised the officer (nothing being proved to him to the contrary) to admit them. Perhaps it might be argued, that he was *bound* to admit them in such case. The occupation of a house is a more substantial evidence of right to it, than a bare lease; more especially in a place where it is well known, leases have always been made occasionally for election purposes: And if there had been any leases produced at this election, they would have been only a mere form. The returning officer therefore was guided by a just presumption of title.

As to the second position, it falls to the ground upon a more correct investigation of the subject. In corporations, in many cases where a burgess has not been formally admitted, if he has the inchoate right to his freedom, a returning officer must admit him; therefore the want of a copy of the inrollment, is not sufficient ground to refuse the vote. In scot and lot boroughs, the rate is not the only qualification; inhabitancy is another; and the rate cannot prove that. There is another sort of election right, which has not been mentioned, viz. that of potwallers: Where is the written

ten evidence of their titles? What other means has a returning officer of ascertaining them, than *viva voce* evidence? In burgage tenure boroughs, deeds are commonly produced, no doubt — But why? Because the voters have no other than the formal title, and can give no other proof of it. They can shew no residence or occupation; and in general have no knowledge of the estates they vote for. From hence what they call a rule of law, appears to be only a practice springing up out of the abuses of it. The law would not put men to such monstrous inconvenience, as that of carrying about their title deeds to every contested election; or require a returning officer to take upon himself the trial of ejections. Again, what are deeds in a legal view, without proof of their execution? Then must witnesses likewise be brought to the poll to establish them? If the leases had been produced when called for here, perhaps the voters would have been equally blamed, for not bringing the attesting witnesses, and the bailiff for not requiring their attendance.

But they endeavour to prove Townsend criminal, because, as they say, it had been the custom at Cricklade always to produce the leases at the poll: And they prove this by passages in the Journals. But in the first case referred to, it is not mentioned as a *custom* at elections;

but only a particular fact, at that election; and that not generally practised, but by some who are distinguished by it. In the second case, it is only mentioned as an argument of the counsel, who used it, perhaps, to gain time by the delay of producing deeds*.

Again, as to his answers and declarations to the voters: In these he did his duty according to law. A man is not bound to give evidence against himself. If any facts had been alledged to impeach a vote, then the voter might have been put to answer them; otherwise the bailiff was bound to receive him: And this is the doctrine enforced by the case of Ashby and White. His advice to them not to answer questions, in these circumstances, was such as a lawyer understanding his duty, might have given with propriety. It was not a dissuasion to them on his part, but an opinion declared upon a reference to him.

* These passages are as follow: A witness of the election in 1689, producing the poll, says, "The persons first placed are the persons *that shew'd their leases* to the bailiff; the persons placed next were the freeholders, &c." See 10 Journ. 72. In the case of 1695, the petition was founded on the want of due notice of the election, and the shortness of the time given; being only one day. And the petitioner's counsel argued, "That it could not be presumed a reasonable notice, because *deeds were necessary to be produced*, to make out the voters right, which would require a longer time."

11 Journ. 461.

A re-

A returning officer may admit many bad votes on a poll, without being criminal or deserving censure for it. Perhaps many may have been admitted on this poll. The error is on the safe side in these cases.

In the case of Cardigan, the mayor had admitted votes contrary to all reasonable grounds of judgment; because, as a leading member of the corporation, he must have known the circumstances of the preceding election, and that the voting in it could not afford evidence of right. But, at Cricklade, the voters lived in the houses voted for; and this furnished a presumption of title. Yet gross as the misconduct of the mayor of Cardigan was, it was not thought a fit subject for censure by the Committee.

The Coventry case was a flagrant violation of the principles of election, and of the rights of the corporation. The poll there was unlawfully protracted, for the purpose of that fraudulent admission of freemen. It was an act manifestly partial and corrupt, which could not be justified by any shew of argument. In both these cases, there is likewise a very material difference from the present. The returning officers in them were ruling members of the corporation; and, by having access to the books, could at once know who were, and who were not, legally intitled to the freedom, and to vote as such.

Their

Their neglect to inspect them, in any case of dispute, would have been criminal : But, in both instances, their guilt was carried farther, and amounted to an active violation of duty. But the bailiff of Cricklade had no such guide to direct him; and was obliged to follow that, which the general circumstances of the place led him to think reasonable. He knew very well in what manner leases had been commonly made and used at Cricklade; and that the occupation of a house furnished a more substantial evidence of title, than an occasional conveyance. He observed this rule uniformly; and the conclusion, drawn from his conduct, to prove a corrupt partiality, is an inference not warranted by the proofs.

The Committee, after deliberating upon the arguments, resolved,

That the parties were bound to give evidence only in support of the titles of those voters which had been impeached; or whose declarations of the rights, under which they claimed to vote, had been falsified; or who had refused, at the poll, to give an account of the title under which they claimed a right of voting.

[This resolution, in a subsequent stage of the cause, was explained by the court, so as not to exclude the petitioners from returning to the attack of those votes against whom they had neglected,

neglected, in going through their case, to give *particular* evidence: For, as they had relied upon the point above contended for, they had omitted this in some instances. Therefore, as soon as the sitting members had closed *their* case, the counsel for the petitioners proposed to call the witness, by whose evidence they made out their objection to some other votes, which they intended to bring within the terms of the above resolution. The counsel for the sitting members opposed this, arguing, that the petitioners had taken their own course at first, and closed their case; and therefore could not mend it by subsequent evidence. That it was contrary to established rules thus to go through a case by piece-meal; and therefore, if they should suffer by their conduct, it would be their own fault, in having left their case unfinished, before they knew the opinion of the Committee; by which all parties must now abide.

On the other side it was contended, that the petitioners had not fully closed their case when they left it to their opponents to answer them; but had only proceeded so far, as in their judgment was proper to require an answer; having always acted upon and declared, their right to resume their case again, if it should be necessary: That the opposite counsel had not been misled by this course; and if they had not then admitted

mitted the position held out to them, they ought in justice to have called for an explanation of it; or to have required the petitioners to have closed their case finally then; which would have brought on the same question as was above decided: That, under the circumstances then before the court, their resolution could not mean to exclude the remainder of the case for the petitioners, but only to apply to what had *then* passed, and to the point contended for.

The Committee hereupon resolved “ *to permit the petitioners to examine the witness, as to those voters, who, at the poll, refused to give an account of the title under which they claimed a right of voting.*” And they proceeded accordingly against five votes not before impeached.]

The counsel for the sitting members, after being informed of the above resolution in p. 350, proceeded upon evidence to prove, that it was the usage of the borough to admit persons to vote as leaseholders, who had been 40 days in the occupation of the houses for which they voted; although they might have had their leases a shorter time before the poll.

The counsel for the petitioners objected to this evidence; arguing,

First, That the resolution of the Committee of 1776, in 4 Doug. Elect. p. 65*, ought to

* See it as copied in p. 324.

be considered, in effect, as a determination of the right, and to be adhered to as the just decision of a court of justice upon the point in issue. That it appeared from the proceedings of that Committee, the minutes of which were now upon the table, that the same question was then agitated, and was considered as such by them.

Secondly, That if it should not be considered as a direct and express decision upon the point, yet the resolution necessarily implied it, according to the plain construction of the words alone; without entering into the circumstances under which it was made, as they appear upon the minutes.

Thirdly, That even admitting any such custom to be proved by evidence, it was illegal; for, if the evidence were to be given on a common law trial of the same question, it might be demurred to: Because occasionality was a fraud upon the law of parliament, and therefore incapable of being established by any evidence. That the sitting members' case, in this respect, should be considered as a declaration at law, stating an illegal custom; which, however confirmed by usage, must fall to the ground.

The counsel for the sitting members maintained the propriety of receiving the evidence, by arguing,

1. That the determination of 1776, though just and legal, as far as the questions then agitated were involved in it, yet was no bar to the point which they now contended for; because, as far as it might be construed to relate to this point, it was extrajudicial; and could not be intitled to the authority of a decision, made upon full and competent examination of the subject. That the present question was not (in its present shape, at least) put to the Committee at that time; for it appeared, from the report of the trial*, that the question there was, whether residence was necessary to freeholders and copyholders; but it was not argued or disputed by the counsel, whether *leaseholders* should have resided 40 days. That this appeared also from a perusal of the evidence then produced, which did not bear upon this point; and though it had been inferred, from p. 58, 59, of the Report, that the counsel took it for granted in their arguments, yet it was, nevertheless true, that it had not been brought into deliberation, as a question for judgment ought to be.

2. That the latter part of the determination ought not to be construed to mean, that the lease should have covered the whole occupation of 40 days; for, suppose a copyholder were to become

* 4 Doug. Elest. 15, 16.

a freeholder 20 days before an election; or, in case the occupier of a house *bonâ fide* should not receive a lease of it till within the 40 days; in such cases it would not be argued that the vote was bad.

3. That the law against occasionality did not furnish a valid objection to the inquiry and evidence they contended for, however it might be applied upon the particular cases which might be found open to it; and it would be the proper time to urge an objection on this ground, when such cases should arise. That the general fraud was not to be presumed; and, on the other hand, cases might happen, in which a lease after the 40 days might not be occasional, as in that abovementioned; for that the occupation of the house, in this borough, was the best test of the right, as far as occasionality might come into question.

The Committee determined to reject the evidence offered, and for this purpose came to the following resolution:

That it is the opinion of this Committee, that the right of voting for members to serve in parliament for the borough of Cricklade, in the county of Wilts, is in the inhabitants possessing houses within the said borough, who are freeholders, copyholders, or leaseholders, for any term not less than three years; or for any such term, or greater term, determinable on

life or lives: Such freeholder, copyholder, or leaseholder, having been as freeholder, copyholder, or leaseholder, in the occupation of the house for which he may claim to vote, 40 days preceding any election: And in the freeholders of the several hundreds, as directed by the stat. 22 Geo. III. c. 31.

This matter being thus disposed of, the counsel for the sitting members proceeded to the case of those voters who were objected to as parish poor, and whose right to vote they now undertook to maintain.

The circumstances of it are as follows :

In the spring of the year 1783, the small pox became very prevalent in the town and neighbourhood of Cricklade. The parish officers endeavoured to prevent the infection from spreading; but they soon found that it extended so generally, as to frustrate their endeavours; and, therefore, upon a consideration of the impending danger to the town and its inhabitants, from the numbers who were liable to it, (for the alarm had spread abroad, and had very much injured the market) it was agreed, at a vestry meeting, to propose an inoculation of the lower sort, at the expence of the parish. An agreement was accordingly made for the purpose, with an apothecary; and public notice of it was given in the town. The entry made in the vestry book, relating to this undertaking, is in these

words: " 10th of April, 1783—It is agreed that the families shall be inoculated at the parish expence, except those who can assist themselves."

A great many applied (and some with much earnestness) to be inoculated, in consequence of this scheme, and were paid for by the parish. But they were not all of the same sort of persons: Some were people who earned a livelihood by their labour, and maintained their families, in general, without any assistance from the parish; and were rated, and paid to the poor, but yet could not have borne the expence of the small pox in their families, without assistance from the parish. Some were of that class called at Cricklade the second poor, who did not receive relief from the parish, but from funds invested in the bailiff and parish officers as trustees, appropriated to charitable uses there, and occasionally distributed; which were never applied to the relief of those to whom the parish collection was given, called the weekly poor. Others were of the class of weekly poor. Some had only the medical expences of the small pox defrayed; others had themselves and families maintained likewise, as long as the effects of it continued.

The trustees of the above charitable funds, upon a consideration of the extraordinary distress and expence of the town, upon this occasion, agreed to apply ten pounds out of their fund towards

the expences of the second poor, under the inoculation; which was accordingly made use of by the parish.

There are two parishes in Cricklade; both of which joined in the measures pursued at this time. They partake equally in the estate above-mentioned, settled upon the trustees for charitable uses.

To all the voters who had received relief from the parish in the above manner, about 38 in number, the counsel for the petitioners stated the general objection, that they were thereby disqualified; arguing,

That their case could not, upon any solid principle, be distinguished from the common one, of receiving alms within the year; that the relief was applied for, and received, on account of the person's inability to maintain himself or family—given by the parish officers, and making part of their accounts; and thus coming within the reason and the definition of the disqualification by receipt of alms. That the accidental misfortune of the small pox could not, by being general, and overrunning a whole parish, alter the circumstances of the individuals who suffered from it; or make a difference between the case of the persons, so relieved by the parish, and that of a single patient; that the misfortune to each man would be the same if a fever had subjected him

him singly to the same necessity; or if a hard winter should involve one or many in want and distress, that would form no exception to the rule, however severe or unexpected the misfortune might be. That it never yet was attempted to argue such cases into exceptions to a rule, which was generally established in parliamentary law; and was not only enforced upon the receipt of parish relief, but in other private charities, which were of the same nature.

The counsel for the sitting members maintained these votes, by arguing,

That there was no such generally established rule of disqualification, as the objection proceeded upon; but that, in every case, the constitution and practice of the place, where the question arose, and the mode of giving and receiving the relief, were to be taken into consideration. That the principle of disqualifying voters, on this account, was according to Blackst. 1 Com. 164, that persons so distressed and dependent, could not be supposed to have any will of their own: And there was also another, viz. that those who were a burthen to society, could not be intitled to the privileges of it. That, upon these principles, the receipt of parish relief was not to be treated as an absolute disqualification, and conclusive against the voter, but only as general presumptive evidence of his falling

within the reason of the disqualifications: For, if one in this situation were, by a lucky turn of fortune, to become a rich man, and to vote at an election within the same year, would it not be unjust to reject such a man's vote, on account of his former poverty? That if receipt of alms were a general disqualification, yet it could extend no farther than that of ordinary parish relief: But the case of the voters in question was not that of *ordinary* parish relief; nor was the expence understood by the parish officers, or by the persons themselves, to be incurred in the ordinary way: Neither did the trustees of the charity esteem it so, when they subscribed a part of their fund towards it. That it was an extraordinary and anomalous case: For it was not in the character of distressed poor that they were provided for; but as persons whom the parish officers, by a prudent exercise of their functions, involved in this necessity, in order to prevent a greater public calamity, and a local injury to the town and neighbourhood. It was a proposal made by the parish to inoculate, and not a distress brought on by the persons themselves; a bargain made with them, by which lives were saved, and expences lessened; and thus far a benefit obtained to the parish in effect.

That, therefore, the parish could not complain of these persons as burthensome, since whatever charge

charge was incurred, was by its own act; and this made a plain distinction between relief given upon distress or sickness happening in the natural way, and such as was administered to these persons; *that* is accidental distress, and this artificial. And though in the case of a fever, or natural small pox, the same persons would have been subject to equal want; yet when the loss of their franchise is in question, and the objection is supported by arguing from a rule of law, which supposes the persons to be burthensome to their parish, this circumstance is enough to distinguish the case out of any such rule.

That the objection was always allowed with reluctance, in cases out of the ordinary course; because, in these, it deprives men of a valuable privilege unexpectedly, and, as it were, by surprise: For which reason, Committees have frequently inquired into the usage, in respect of particular charities, whether they have been held to disqualify or not; as in the case of Harpur's charity and others, in Bedford, mentioned in the report of the Bedford case, in 2 Doug. Elect. Similar principles prevailed in the arguments upon similar cases, in the trial of the Sudbury petition, in 1781. That the argument drawn from surprise upon the voter, was applicable to these; because it could not be supposed, that they would have come with so much readiness

to

to take the offer of the parish, if they had been told that it might deprive them of their votes at the election. Many might have escaped the infection; and others might have gone to earn a livelihood elsewhere, to avoid it.

The counsel for the petitioners replied,

That there was no case in which it had been determined, that receipt of alms, within the year, did not disqualify. That the application of the charity money to the uses of the parish, made not the least difference in the case; because it was employed together with the money collected by the rate, and as part of it; and it bore, besides, but a small proportion to it. That it was, therefore, simply a question upon the effect of parish relief to a voter.

That upon this subject the rule was general; and, in order to avoid innumerable and subtle distinctions, a line had been drawn to include all persons so circumstanced: Many cases having happened, in which the receipt of alms, but once within a year, had been held to disqualify; for an inquiry into the relative situations of such men would be endless.

That these voters had brought the disability upon themselves; therefore if any difference existed between persons in distress from natural sickness, and those under an artificial one, the latter seemed the least intitled to any favour; for
the

the burthen to the parish is the same in both cases, and is equally felt in both, by those whose property contributes to it.

That it could not be argued to have been a benefit to the parish, without admitting it to have been a benefit to the persons themselves; and if beneficial to them, it was merely on account of their inability to maintain themselves; which is the state of dependent poverty, that subjects men to the influence of others: That the same persons would certainly have been in equal distress, if they had got the disorder by infection; which, but for the precaution of the parish officers, would have happened here, most probably, with greater severity to the patients.

That it was not necessary to tell men the legal effect of the receipt of alms, any more than the other obligations of the law; because all men are presumed and bound to know them, and must submit to suffer, if they neglect this knowledge of their duty. But suppose these voters had been thus ignorant, and informed of the consequent disqualification, at the same time that they saw the danger of ruin to their families, from the approaching disorder, would not the assistance thus given have been thought an equivalent, for the probable loss of their votes at a distant election?

That

That it was fallacious to argue upon the case, as involving the *loss* of a franchise, because, at most, it amounted only to a temporary suspension of it; which might revive again in the following year; and generally continued as long as the industry of the voter.

The Committee came to the following resolution upon this case, viz.

That those persons who submitted themselves or their families, to be inoculated in the year 1783, by the invitation of the parishes of Cricklade, and received relief in consequence of such inoculation, were not thereby disqualified from voting at the last election.

The above resolution extended to several of those voters to whom the petitioners had objected as receiving alms.

While the petitioners were examining witnesses to establish their objection to those whom they called paupers, in many of which instances, the receipt of alms appeared to have been confined to the time of the small pox, the counsel on the other side would have cross examined the witnesses as to the general circumstances of the persons; in order to shew, that at other times (*more than a year* before the election) they had paid rates, and were not at all in a state of want. The counsel for the petitioners objected to any such inquiries; contending, that the law had fixed the line, by limiting the period of inquiry

to

to a year, before the election: Let a man be rich both before and after that period, it signified nothing; his receipt of parish relief within it, disqualified him absolutely; he is thereby placed in a state of dependence, when the vote is supposed to be asked and given.

The counsel for the sitting members contended, That this limitation was not general and unqualified, but existed only under special resolutions of the House of Commons respecting particular places; as in the case of Reading, it had been extended to two years. That there being no resolution of this sort affecting Cricklade, it remained open to the general principles of law and evidence; according to which, the receipt of alms afforded only a presumption of poverty in the receiver, without excluding further inquiry into his general circumstances. That it was more especially just and reasonable to permit such inquiry in a case like this, arising upon a public calamity to a whole town, which was casual and temporary.

The Committee resolved,

Not to admit evidence to be heard as to the condition of the voters, beyond a year previous to the election.*

* The election happened in April, 1784. The time of the small pox was in April and May, 1783.

The other questions that arose upon the borough votes were not decided; for which reason I do not enter into the particulars of them. There were several agitated; but the course taken by the Committee, in coming to their final determination, rendered it unnecessary to deliberate upon them. They did not affect many votes, and chiefly arose upon individuals out of disputed facts. The principal one was, whether a lease, intitling to vote, ought to be *in writing*.

At the time when the Committee came to the resolution in p. 352, they determined likewise, that the petitioners should then continue their proceeding, and go through their *whole* case both of borough and hundred voters *. This did not pass upon the suggestion or debate of the counsel, but was the direction of the court. They proceeded accordingly; and, after this time, the cause became, in substance, the trial of a county election in the five hundreds.

* The counsel for the petitioners not being prepared to enter so soon on the evidence of this part of their case, after finishing their five new objections to the burgesses, desired to have further time allowed them, by an extraordinary adjournment over the following day; and requested the chairman to move the House for leave to make such adjournment. This was accordingly done, and the adjournment made to the second day following, when they produced their evidence upon the hundredors.

The

The petitioners proceeded against 95 freeholders, who voted for their opponents: The objection to 74, was founded upon the statute 20 Geo. III. ch. 17. in respect of their assessment to the land-tax; in eight of which, other objections, included in the following numbers, were united; to 21 the objection was for not being legal freeholders; to six as paupers; to one, as not within the hundred; to one, as having purchased within the year; and they endeavoured to establish seven, whom the bailiff had rejected.

The sitting members objected to 103 freeholders: To 83 of this number, on account of assessments to the land-tax; to six, as not freeholders; to three, as having their estates reduced under value by mortgage; to one, for a similar reduction by debts and legacies, under the will of the last owner; to two, for inferior value in themselves; to three, as paupers; to three, as employed in the Post or Stamp Offices; to one, as not a year in possession; to one, as not properly described on the poll; and they endeavoured to establish one, whom the bailiff had rejected.

I have placed the few questions which the Committee decided, in this second part of the cause, together with those of the Bedfordshire case upon the same subjects, and under their
respec-

respective divisions there, as the place to which they more properly belong: Except that I do not class the few which depend on the particular construction of the assessment act, made by this Committee, with the corresponding cases, but by themselves; for the reason which the reader will find prefixed to those cases.

There were many other questions besides those mentioned in this book, argued by the counsel upon the county votes; but not determined by the Committee. The most important legal question, arose out of an objection made by the petitioners to the votes of the 12 burgessees of Malmesbury; who hold each a parcel of land in right of their burgesseeships, in some measure like the prebendal rights in chapter lands. The objectors argued, that the lands belonged to the corporation aggregate, and not to the individual members of it. The nature of this sort of tenure was very learnedly discussed upon this occasion; but I avoid a recital of the arguments for the reason before given.

The Committee having found, upon a view of the general questions in the cause, a great majority for the petitioners clearly established, resolved upon their final determination accordingly; without entering into the particular legal questions, either of the borough votes or hundredors.

dredors. This resolution passed, and was communicated to the parties on the 31st of March.

On the 4th of April *, the Chairman informed the house, that they had determined,

That

* This distance of time between the determination of the Committee, and the Chairman's report to the house, was owing to the accidental stoppage of business there, by the non-appointment of the Committee for the Buckinghamshire election. The day fixed for that appointment was March 22 preceding; on which day, though 172 members were present, so many were disabled to serve, that a select Committee could not be formed. On the following days there was the same deficiency; and the house continued in this state of incapacity, daily opened and adjourned by the Speaker, as the law required, (Easter intervening) till the 4th of April following; when a Committee was at last formed for the trial of the above election, and the house was again opened to business. Till this day, the declaration of the resolutions of the Cricklade Committee could not be made; because the stat. 11 Geo. III. ch. 42. sect. 4. provides, that the house shall not proceed to any business whatever except the swearing of members, previous to entering upon the ballot when fixed in the order of the day; and if that should not take place, the house must immediately adjourn. This regulation, excellent in its principle, was however too rigid, in excluding from the house those necessary acts of form, which are required in some important affairs, and which would not have interfered with the general design of the law. And it has been amended in the act of the last session (28 Geo. III. ch. 52. sect. 12.) so as to enable the house previously to receive and act upon reports from select Committees, and to attend the royal summons in the House of

*That the petitioners were duly elected *, and ought to have been returned.*

The Chairman at the same time reported to the house, by the direction of the Committee, the following resolution, which they passed respecting the returning officer.

“ That it is the opinion of this Committee, that the conduct of the returning officer, in taking the poll and making the return, at the last election of members to serve in parliament for the borough of Cricklade in the county of Wilts, was partial and illegal; whereby a colourable majority was obtained on the poll for Mr. Adamson and Mr. Cox.”

The house hereupon appointed a day in the following week, for taking this report into consideration.

The subsequent proceedings in the house upon this last resolution of the Committee, occasioned many debates, and employed much time there; having continued by several adjournments to the end of the session. The purpose which the Committee had in view, of drawing forth from the house some punishment upon the returning officer, was at last not obtained; and therefore I shall

Peers. In the preface to my first volume, I took the liberty to recommend such an alteration.

* 40 Journ. 757.

relate only a short and general account of the proceedings upon this report.

It happened, I know not how, to interest and engage very particularly the most distinguished members; and to be involved in those considerations, on which parties exert themselves in public affairs: And thus the measures proposed on one side, were strenuously opposed on the other; till by repeated adjournments, the whole of the session was spent without concluding any thing upon the subject.

On the day after the above appointment, it was ordered, that the minutes of the proceedings of the Committee be laid before the house *. On the 11th of April, the report was taken into consideration. The entry in the Journal of this day † states, a motion for reading the Journal of the proceedings of the house, upon the case of Shoreham in 1770 and 1771; which was read. Also a motion for reading the petitions presented to the house upon this election for Cricklade, which were read. Also a motion for reading the Journal of the proceedings, upon taking into consideration the report of the select Committee upon the Cricklade election in 1782, which was read. After which, the question being proposed, That the house agree with the Com-

* 40 Journ. 767, 772.

† Ibid. 833.

mittee in their aforefaid refolution, the houfe was moved that the minutes of the evidence might be read, and this reading being objected to, and a debate arifing thereupon, it was ordered, that the debate be adjourned till the 14th of April following.

Thus far the Journal: The debate upon thefe questions lafted fome hours. A member of the Committee moved to have the charge againft the bailiff heard at the bar; but dropped it, upon the recommendation of the fpeaker to have the precedents looked into, and the fubject adjourned, in order to be further confidered. This gave rife to further debate, and other motions. One was to agree with the refolutions of the Committee; and another, to order the returning officer to appear at the bar, to make his defence. Thefe motions were ftrenuoufly fupported, and oppofed. The argument for them was founded, in general, upon the neceffity and expedience of placing implicit confidence in the reports of a felect Committee, after a regular judicial inquiry upon oath; fo far, as to put the party upon his defence to a charge therein made, in the firft instance; and afterwards to punifh, if he fhould not exculpate himfelf: And this was faid to be analogous to the practice of the houfe, in other cafes of as great importance, as upon private bills; and to the
courfe

course used before the Grenville act, when the house proceeded in the same manner upon reports of the Committees of privileges.

The principle of the argument against this measure was, That the house, as judges upon a criminal charge, were bound in justice and conscience, to be informed by evidence given to themselves; and ought not to proceed to punish a man, upon inference from facts found by another tribunal, without being convinced by knowledge of their own *: That it was, therefore, necessary to proceed through the evidence of the guilt charged upon the bailiff, by a regular inquiry *in the house*, before the house could inflict

* The same principle might be urged against a frequent practice of the house, since the institution of the new election court. If a witness there should commit perjury, or prevaricate (See sect. 26. of the act 10 Geo. III.) the course was for the Chairman to report it to the house, and to move, that he be committed to Newgate: Upon which, the motion passed, and the Speaker made his warrant accordingly. Yet this was never objected to; but passed without any inquiry, by the house, into the particulars of the offence; and merely upon the authority of the Chairman's report. The last instance of this kind, I believe, is that which happened in the case of Ilchester, mentioned in my first vol. p. 470. In the act of the last session, 28 Geo. III. ch. 52. a very proper amendment was made of the above section, by empowering the Chairman of the Committee, in such case, to commit to the Serjeant at Arms directly.—See sect. 16. of the last mentioned act.

any censure or punishment upon him. That the antient course, was only different in form, and not in substance from this; because the Committee of privileges was a Committee open to the whole house; and a report from that Committee to the house, was only a reference from the house in one form, to the same body in another form.

These arguments were illustrated and enforced in many able speeches on each side. Both parties, however, seemed to agree in thinking, that it would be wiser and better, to let the select Committees in future exercise that authority over returning officers whom they might adjudge culpable, which now rested in the house; and that such an alteration of the law, might with propriety be introduced into the bill, then * passing through the house, for amending the Grenville act.

On the 14th of April, when the adjourned debate abovementioned was resumed, a member who had taken a principal part against the returning officer, moved, "That a Committee

* The bill here alluded to, was the subject of many debates during this session; but was at last dropped, before it was ready to pass the House of Commons. It has been since improved and extended, and again introduced into the house under the care of the same right honourable member who first proposed it, and was passed into a law of the last session, stat. 28 Geo. III, ch. 52. The amendment above proposed does not make part of it.

be

be appointed to search the Journals, touching the usage of the house in cases of reports of Committees of privileges or elections, respecting the conduct of returning officers; and to report the same to the house."

This was accordingly ordered without dispute. The original debate was again adjourned for a week *, and then further adjourned to the 26th instant. On the 25th, the Committee above appointed to search for precedents, made their report *; which is printed at length in the Journal of that day †; and the original

* 40 Journ. 850, 873, 894, 916.

† Ibid. p. 889. This report contains a great number of cases, judiciously arranged in separate classes according to their subjects. It does not appear that in any one of them, the house required that previous inquiry into the justice of a report against returning officers, in order to call them before the house to make their defence, which on one side was contended for in the present case. The greater part of the above cases happened before the year 1673; till which time, the practice of the house was the same in its principle, as it would be at this time, to take a similar course upon the reports of Select Committees: Because, till then, the election Committees were composed of a limited number of members, and were not open Committees. In this period, therefore, the reports cannot be considered to have been made by the house in one form, to the *same* house in a different form; which was an argument employed against the effect of the precedents, on which one side had relied in the debate.

original debate was adjoured to the 29th*. Then again adjourned to the 2d of May*; again adjourned to the 19th following. On the 2d of May, the select Committee were ordered "to extract from the minutes of the said Committee,

The case of Shoreham in 1771, tried before a Select Committee, is so much in point to the argument of those who moved to agree with, and to act upon, the resolution of the Committee, that I have extracted it from the report for the reader's observation, in the words of the Journal, p. 893. "Shoreham, Jan. 29, 1771. Report received, stating, that the conduct of the returning officer in taking the poll, and making the return at the last election, was illegal—Ordered, "That the returning officer do attend this house on Thursday, 14th February."—Feb. 8, Returning officer called in—His charge read—Directed to withdraw—Called in again, and having said, that he was not guilty of the charge contained in the said resolutions, the original poll taken at the election was produced; and John Browne examined in support of the charge. And then the said Hugh Roberts, the returning officer, was heard in his defence. And having proposed to produce evidence, in support of what he had alleged in his defence, he was again directed to withdraw—Feb. 12—Called in again, and produced several witnesses, who were examined, in his defence.—Directed to withdraw.—Resolved, "That H. Roberts, the late returning officer, &c.—having, &c. &c.—hath thereby acted illegally, and in breach of the privilege of this house."—Ordered, "That the said H. R. be for his said offence, taken into the custody of the Serjeant at Arms."—Feb. 13. A petition from the returning officer read.—Ordered to be brought to the bar to-morrow.

* 40 Journ. 922, 1001.

mittee, such particulars as appear therein, of partial and illegal conduct in the returning officer for the said borough:—And to report the same to the house, together with the evidence thereon *. On the 19th the debate was adjourned to the 3d of June; and on that day to the 9th following *. On the 9th the subject was not resumed. On the 13th, a report was made by the select Committee, of extracts from their minutes of the evidence, according to the order abovementioned *; which report is printed in the Journal of that day: After which there is nothing in the proceedings of the house of this session, relating to the first report against the returning officer.

to-morrow.—Feb. 14. Brought to the bar, where he, upon his knees, received a reprimand from Mr. Speaker, and was ordered to be discharged out of custody.

A similar proceeding (in the first resolutions) was had upon the report of the Cricklade Committee in 1782, upon the authority of which, the statute for changing the right of election, as before-mentioned, was founded. But in that case, there were no steps taken for the punishment of an individual.

* 40 Journ. 1047, 1063.

CRICKET

Cricket is a game which has been played for centuries in England and other parts of the world. It is a game of skill and strategy, and is played on a large field called a cricket ground. The game is played between two teams, each consisting of eleven players. The players are divided into two groups: the batting team and the bowling team. The batting team's objective is to score runs by hitting the ball with a bat, while the bowling team's objective is to prevent the batting team from scoring runs by bowling the ball. The game is played in a series of innings, with each team batting and bowling in turn. The team that scores the most runs in a match is declared the winner.

Cricket is a popular sport in many countries, particularly in England, Australia, India, and the West Indies. It is a game that requires a high level of skill and fitness, and it is a game that is enjoyed by people of all ages. Cricket is a game that is played in a variety of formats, including Test matches, One Day Internationals (ODIs), and Twenty20 (T20) matches. Each format has its own unique rules and regulations, and each format is played over a different period of time. Cricket is a game that is played in a variety of venues, including large stadiums and small local grounds. Cricket is a game that is played in a variety of climates, from hot and sunny to cold and rainy.

XII.

THE

C A S E

Of the COUNTY of

B E D F O R D,

In 1785.

The Committee was chosen on Friday, March 18,
1785, and consisted of the following Members:

Lord Viscount Middleton, *Chairman.*

Hon. Horatio Walpole.

John Vaughan, Esq;

Edward Cotsford, Esq;

George Dempster, Esq;

John M^cBride, Esq;

John George Philips, Esq;

Sir John Frederick, Bart.

Philip Rashleigh, Esq;

George Vansittart, Esq;

Richard Payne Knight, Esq;

Henry Addington, Esq;

Orlando Bridgeman, Esq;

NOMINEES.

Sir James Erskine, Bart. *Of the Petitioner.*

Wm. Mainwaring, Esq; *Of the Sitting Member.*

PETITIONER.

Hon. St. Andrew St. John.

Sitting Member.

Lord Ongley.

COUNSEL.

For the Petitioner,

Mr. Graham, and Mr. Le Blanc.

For the Sitting Member,

Mr. Rous, and Mr. Douglas.

T H E
C A S E
Of the COUNTY of
B E D F O R D,

In 1785.

THE petition contained a general account of the proceedings which led to the determination of the former Committee upon this election; stating the numbers on the poll, viz. for Lord Offory 1050, for Mr. St. John 974, and for Lord Ongley 973; Lord Ongley's petition, and the alteration of the return in his favour; by which Mr. St. John's majority of *one* was transferred to Lord Ongley, and the latter became the sitting member: The whole of which proceedings may be seen in my Report of the case in the first volume.

The petition likewise contained a charge of bribery against Lord Ongley: And alledged, that the sheriff had admitted many illegal votes
in

in his favour, and rejected many legal votes tendered for Mr. St. John*.

On the same day in which this petition was read in the House, (Feb. 1st.) it was "Ordered, That the petitioner should, by himself or agents, on or before the 28th day of February, deliver to the sitting member or his agents, lists of the persons intended by the petitioner to be objected to, who voted for the sitting member; giving, in the said lists, the several heads of objection, and distinguishing the same against the names of the voters excepted to: And that the sitting member should, by himself or his agents, within the same time deliver the like lists on his part to the petitioner or his agents†."

This order passed in consequence of a general resolution for the purpose in county elections, which the House annually makes at the beginning of every session. It appears in the votes of January 26, of this session (A.)

The parties mutually exchanged their several lists pursuant to this order (B.)

The reader has seen, perhaps, in the former volume, in what manner the first petition against Mr. St. John was determined. By that decision, Lord Ongley was considered to have been duly

* 40 Journ. 472. 1st of February, 1785.

† 40 Journ. 473.

elected before the sheriff, and intitled to the return; but without prejudice to any inquiry into the merits of the election. The present petition therefore stands *wholly* unconnected with the former; and in the same point of view, as if Lord Ongley had been originally the member returned, and Mr. St. John had, at first, petitioned against him upon the merits of the election. These are the subject matter of the present cause.

I have found it difficult so to arrange and abridge the great mass and variety of cases determined by this Committee, as to bring it within the compass of my undertaking. A full and particular narrative of the whole trial would be useless to all but the parties concerned; and this method of treating a cause, neither suits my design or inclination. I have endeavoured, therefore, to state the proceedings in such a manner, as seemed fittest for professional use. As to all other questions, relating only to the history of the election, or the local and temporary interests of the county or the parties, which will necessary be forgotten in a few years, even among themselves, I have omitted them altogether.

In relating the several decisions, I have not regarded the order of time, or the particular occasions which produced them; but the subjects

to which they belong, according to my arrangement of them. For which purpose I have placed all those upon votes objected to, or questions relating to them, that were capable of being so classed, separate from the present general account of the cause; and, together with them, the corresponding decisions of the Cricklade and Buckinghamshire committees. By this arrangement, the reader will see altogether and at once, the whole body of determinations upon county votes, made in the present parliament; (or such, at least, as in my opinion, represent the whole) instead of searching for them in three detached cases. In this respect, I consider the above cases as several parts of the same subject, capable of better effect, by being so far united. In reporting the general state of the cause in each of them, I treat of such matters only as do not contain their decisions upon the freehold votes; which the reader may have observed of the Cricklade case.

I have omitted altogether many questions of merely legal rights; as those arising upon wills, (of which there were some decided) and such others, of which the courts of common law have the peculiar and proper cognizance; and have endeavoured to report only the cases of a parliamentary or election kind: Because the judgments of those courts, and the reports of their
pro-

proceedings, are the only authority to which lawyers submit, upon judicial questions.

I have sometimes doubted of the propriety of publishing the decisions upon the assessment act; because the effect of that act upon the right of voting, is to cease after the commencement of the new law, to be established in July 1790, by stat. 28 Geo. III. c. 36. But since the state of public affairs has caused a general apprehension, that a new parliament may be called before that time, (in which case, county elections will be regulated by the old law) it seemed to me proper to include the cases, explaining that law, in this Report. It is said, likewise, that in many counties the new act has excited complaints, which are to be addressed to the House of Commons against its establishment. It will be found, perhaps, that these objections are not raised against the principle of the act, (which has always seemed to me an excellent one) but against the difficult and embarrassed manner, by which many of its regulations are to be carried into execution.

The present being the first English county election which has been regularly tried *through* by a select Committee, and determined upon a consideration of the whole cause *, I think it necessary

* See the five concluding pages of the Resolves of the Gloucestershire Committee, published by their chairman;
Vol. II. C c from

fary to give a particular account of the mode of proceeding observed by the Committee, throughout their inquiry. And I hope this reason will serve for my excuse, if, from an attention to such points, I may sometimes be thought tedious.

The original poll books of the election were produced in court by the clerk of the peace.

When the counsel for the petitioner had opened the general state of their case, it became a question in what manner it should be conducted; whether the petitioner should go through the whole of his case at once, and then receive a general answer from the sitting member; or whether he should proceed by separate hundreds or booths, considering each hundred as a separate cause, and obtaining a decision upon the votes in each, separately, as he proceeded.

The counsel for the petitioner proposed the latter method, and named the hundred of Barford as that with which they would begin: This was objected to by the other side. For the petitioner it was said, That this method would tend much to facilitate and shorten the proceedings; that, according to the decisions of the Committee in the first hundred, the parties might regulate all future cases of the same sort; whereas, without some

from whence it appears, that the trial of that petition was abandoned by the petitioner, before the regular conclusion of the cause.

such

such standard, they would be obliged to bring forward a multitude of similar cases, from not knowing whether it were useful or not. That it would be much easier for the Committee to decide, as well as for the counsel to argue, and the agents to prepare evidence, upon the cases of each separate booth or hundred, than upon the aggregate mass of the whole county; which latter method produced infinite difficulty in the Gloucestershire case, and rendered a full investigation of the cause almost impossible.

For the sitting member it was said, That the Committee, having a power over the cause before them, ought so to order the conduct of it, as to deal equal justice to both parties; that it would be unjust to suffer one party to take that course which he might think most suitable to his own interest, and to proceed partially through his case, feeling his way as he advanced, and directing his evidence accordingly: That the general course of proceeding, in all causes, was for the plaintiff to prove his whole case, before the defendant was called upon to answer it; and no precedent could be shewn to authorize such a departure from it, as was now required; no election cause having ever been so conducted: That the accumulation of questions so much dreaded by the petitioner's counsel, might easily be avoided, by obtaining general decisions upon

such legal questions as were likely to occur often; which the Committee would naturally resolve for their own convenience, as well as that of the parties. That in the present instance, it would be peculiarly hard upon the sitting member, who had relied upon the established practice in such cases, and had not yet prepared evidence in his defence; naturally expecting to do it more effectually during the inquiry into the case of the petitioner.

The Committee, after deliberating upon the question, came to the following resolution:

“ That the counsel for the petitioner do begin with the hundred of Barford; and that upon his having concluded his objections to the votes within this hundred, the counsel for the sitting member do proceed to substantiate the votes so objected to; and then proceed on the list of objections within the same hundred; and the petitioner’s counsel will then enter upon the defence of the votes so objected to, and conclude his case, as far as it relates to that hundred.”

When the Chairman communicated this resolution to the parties, he said, he was authorised to declare, *“ That the Committee had not positively fixed upon this mode of proceeding for the whole cause; but if they should find it inconvenient in this hundred, they would afterwards alter it. And if any particular inconvenience should, in this*

first

first instance, happen to the sitting member from following the rule laid down, they would endeavour to accommodate him in its application."

The petitioner accordingly proceeded in his evidence of objections to votes in the hundred of Barford, as stated in the list delivered to the sitting member, pursuant to the order of the house.

The mode of proceeding by hundreds was not afterwards complained of on the part of the sitting member; on the contrary, it seemed in practice to be mutually convenient to the parties, as well as approved by the court. While the petitioner was going through his case in the hundred of Barford, he gave timely notice to the sitting member, that he intended to proceed next upon the hundred of Manshead. In the course of his proceeding in that hundred, he also gave notice of the next he meant to take; soon after which, on the 12th of April, before Manshead hundred was gone through, the counsel for the sitting member applied to the Committee, to direct the petitioner to name the order, in which he meant to take all the remaining hundreds. This application was thought reasonable, and the court accordingly required the petitioner to give notice of the order of his proceeding, as early as possible; and named the next day for it. The petitioner agreed, and

being then prepared to state the order, delivered a paper containing it to the opposite party, which was acceded to. This order directed the remainder of the trial, without any difficulty arising on either side. It was as follows: 3d hundred, Clifton and Wixamtree; 4th, Bedford; 5th, Flitt; 6th, Redbornstoke; 8th, Willey; 9th, Stoddon.

Sometime afterwards, on the 25th of April, the case of the voters rejected at the poll, presented itself for consideration, as requiring some separate regulation. No question of this sort had occurred (those for the petitioner being included in *his* lists of objections) before the sitting member began his case in the hundred of Flitt. He there offered evidence in support of a vote tendered and refused at the poll. The other party objected to it, because the vote was not specified in the sitting member's lists of objections, so that they had no notice of it; and therefore contended, that it was not competent to them to enter upon it: That the case was within the spirit of the order of the house, requiring the exchange of lists (*see p. 382.*); and the petitioner had complied with it on his part, as to such cases.

The counsel for the sitting member answered,

That

That the order did not extend to such cases; but merely to the lists of votes received upon the poll, by the words *who voted* and *heads of objection*; That this man could not be said to have *voted*; nor was it possible to state the *objection* as to him, because the objection, if any, was to come from the other side; which objection had been already made at the poll, and had prevailed. That the sitting member wanted to have him *received* on the poll, and therefore according to the true spirit of the order, the party objecting ought to have stated the objection intended by him to be made to the present application. That the petitioner had notice enough of the case, by the tender at the election, which doubtless had been entered in his check book. That the course now sought for, had not been practised in the Gloucestershire case; and in that of Buckinghamshire, in which no question arose upon it, only *one* of the parties (as in the present cause) had observed it.

The petitioner's counsel replied,

That the reasoning upon an implied notice from the check books, was equally applicable to all other cases of objections.—That the only true construction of the order was, to require a mutual notice of every vote intended to be the subject of evidence or inquiry, in the course of the trial, for the mutual convenience of parties;

ties ; within the reason of which rule these cases fell, equally with the others. That in the Gloucestershire case, the want of such notices in the lists exchanged, had been felt by the Committee ; who had directed the parties to deliver to each other, a list of such rejected votes as they intended to bring forward.

The Chairman informed the parties, that the Committee had resolved,

That they should deliver to each other, on the next day, a list of all such persons as they meant to add to the poll in this and the following hundreds ; and that the consideration of all such votes should be deferred, till all the votes already objected to were decided.

At the latter end of the cause, after the sitting member's case in the last hundred was closed, and it became the petitioner's turn to give evidence in reply, his counsel called on the other side to proceed *then*, with the remainder of his case upon the rejected voters, who were the subject of the above resolution ; and thus finish his *whole* case, before the petitioner should enter upon the reply or requalification. This was refused by the sitting member's counsel ; who relied upon the terms of the resolution, " till all the votes already objected to, shall be decided."

On

On the other hand, it was said, that as the numbers of the poll were known to be very nearly ballanced, it would be dangerous to hold out such a temptation to parties and witnesses, as the previous decision of all but the few rejected votes would offer; as it might happen, that the election would depend upon two or three votes. That in this view of the subject, the court ought to construe their resolution, as they might think it most expedient to justice.

The Committee resolved, not to communicate to the parties, their decisions upon the votes of this last hundred, till the conclusion of the whole cause on their parts; when the decisions upon the rejected votes would be declared, at the same time with those of the hundred. And they then directed the petitioner's counsel to proceed with their evidence to requalify.

The case in this hundred was finished in the same manner as the rest. After that, the Committee deliberated upon the several cases; but did not, as in the former hundreds, declare their decisions upon them to the parties and counsel upon their being called into the court. The sitting member then entered upon the cases of his rejected voters, which were six in number.

One of them, John Dilly, had belonged to the poll book of the united hundreds of Clifton and Wixamtree; which had been passed through
before

before that of Flitt, in which the above resolution (in p. 392.) was made, and to which it refers. When the sitting member offered evidence relating to him, it was opposed, on the ground of its not being within the resolution; which (it was said) extended only to the hundred of Flitt, and the others that stood after it, according to the meaning of the words "this and the following hundreds." The Committee seemed to be unanimously of this opinion: And Lord Ongley's counsel acquiesced in it, relinquishing their pretensions to the vote.

From hence it is to be understood, that according to the opinion of this Committee, it is necessary for parties to give notice to their opponents, of those rejected voters whom they intend to restore to the poll. With respect to the *time* of such notice, there was nothing to ascertain *that*, in the above case; further than that it may be *after* the beginning of the trial,

The petitioner's list of votes to whom he objected, amounted to 354; the sitting member's to 398; reckoning in each the votes tendered and rejected, and the mistakes on the poll. The former proceeded upon 329 votes before the Committee; the latter upon 248: So that the court decided upon 577 cases. Many of them, indeed, produced no debate; it often happening,
that

BEDFORDSHIRE, 1785. 395

that the counsel finding an objection well founded, submitted to it in the first instance.

According to my calculation of the numbers, the following list contains a general state of the prevailing objections to the votes struck off the poll upon this trial.

Not duly assessed to the land-tax	-	174
Annuities not registered	-	4
Having no right, or no freehold interest in the estates voted for	}	61
[Of which number there were		
11 Copyholders, and		
10 Leaseholders.]		
Under the yearly value of 40 shillings, (of which were reduced under value by mortgage, 6.)	}	42
Purchased within 12 months of the election	- - - - }	5
Disqualified by offices	- -	3
Under age	- - - -	2
Improperly described on the poll	-	6
Polled twice	- - -	2

299

There were besides, of
 Votes not entered on the
 poll } and added now { 1
 Ditto rejected at the poll } 5
 The

The want of regular assessment to the land-tax, was an objection proceeded upon to 277 votes. In 223 of these, it was the only real objection; in the remaining 54, it was coupled with other objections: So great has been the effect of the statute 20 Geo. III. ch. 17. in the determination of county elections. The title of it, "*To remove certain difficulties relative to voters*" at them, has given room for facetious remarks, which may perhaps be remembered; since its real merit may not happen to be fairly tried by time and experience: The continuance of it in this respect, depending on the introduction of the new law abovementioned, in the course of the next summer (C.)

The effect of the several decisions of the Committee, at the conclusion of this trial, by striking off from, and adding to the poll, left the numbers for

The petitioner	—	829
The sitting member	—	825

Majority for the petitioner	4
-----------------------------	---

In consequence whereof

The petitioner was declared duly elected, and intitled to the return.

Of

Of which the Chairman informed the house, on Thursday, the 19th of May *. The Committee having sat continually, and with unremitting diligence, for two months.

In the course of the trial, two of the members were taken ill, and unable to attend; Mr. Rashleigh on the 7th of April; and Mr. Dempster on the 14th. And they had respectively leave of absence granted them, upon motion made in the house for that purpose by the Chairman. Neither of them attended the Committee again.

On the day of Mr. Dempster's first absence, which was the 24th sitting of the Committee, the members, justly considering the loss and inconvenience that would ensue to the parties, if a third member should, in the same manner, be rendered unable to attend, and their proceedings thereby become void, (according to sect. 23 and 24 of the Grenville act †) recommended

to

* 40 Journ. 997.

† These restrictions of the original act, are amended and enlarged to a certain degree, in sect. 17. of the stat. 28 Geo. III. ch. 52; by which it is provided, that in such cases, when the Committee shall have held 14 sittings, a number not less than 12 may continue the proceedings; and after 25 sittings, 11 members may, in the same manner, proceed: But here the extension of their authority ceases. In the Preface to my first volume, I ventured to recommend an enlargement

to their Chairman to move the house for leave to bring in a bill, to continue the proceedings of the Committee in case of any such accident. Lord Middleton made report accordingly to the house on the same day, and had leave to bring in the bill *; which afterwards passed both houses, and is now the stat. 25 Geo. III. ch. 17. It recites the circumstances of the case, and the injury that might ensue to the parties from it, and enacts, That if the said select Committee shall, by the indisposition or death of any of the

largement of the powers of the first act, in such cases of difficulty; and though the act of the last session has considerably improved the first in this respect, I still think the bounds of it are not extended enough. I would be understood, rather to object to the limitation in kind, than in degree; for the principle of it has always seemed to me ill founded; tending to create jealousies of the proceedings of a court of justice, or suspicions of its partiality, not warranted by experience, and not suited to the spirit of our judicial constitution. The Bedfordshire act proves, that if a case should happen not within the rule, it would be proper for the legislature to interfere, and to make a particular exception. This not only confounds together the legislative and judicial powers, which, though necessity may justify, ought to be most carefully avoided; but might likewise, from particular circumstances, open the proceedings of the election Committee, while pending, to the house at large. Such an act as the case would require, must necessarily have its beginning in the House of Commons; and I need not suggest cases in which the spirit of party might immediately mix with, and direct the course of any application for it.

* See 40 Journ. 849, 854, 870, 874.

members, be further reduced to eleven, it shall be lawful for the House of Commons, upon application made to them for that purpose, to authorize and direct the said select Committee to proceed in the matters referred to them, and report upon the same: Which report shall be deemed to be as valid, as if the number of the said select Committee had not been reduced to eleven; any thing in stat. 10 Geo. III. ch. 16. to the contrary notwithstanding.

The case provided for did not happen; all the remaining members having continued their attendance. The act recites, and proceeds upon the probable injury and inconvenience to the parties; but neither of the parties in this case, applied for or interfered relating to it. It was entirely the act of the Committee, proceeding from a just sense of the duty of their station.

THE OBJECTIONS made and decided upon in the course of the cause, may be classed under the following heads; arising from

I. Mistakes and errors on the poll. II. The insufficiency of the estate. III. The want of regular assessment to the land-tax, or registration. IV. Personal disqualifications

I. Mistakes and errors on the poll, occasioned by

1. Wrong entry of the vote as to the candidates.

2. Wrong

2. Wrong description of the owner or tenant, situation or quality of the freehold.

II. The insufficiency of the estate, depending on its quality, or value.

1. The quality, as copyhold, leasehold, or other interest less than freehold.
2. The value, as either
 1. Worth less than 40 shillings in itself; or
 2. Reduced by
 1. Charges, as rent, mortgage, &c.
 2. Taxes, national or parochial.

III. The want of regular assessment to the land-tax, required by the stat. 20 Geo. III. ch. 17. arising from

1. The nature or quality of the freehold.
2. A wrong description of its situation, owner or tenant.

[Registration is required of annuities, by stat. 3 Geo. III. ch. 24.]

IV. Personal disqualifications, as

1. Not being a year in the possession of the freehold.
2. Under age.
3. Holding a disqualifying office, according to stat. 22 Geo. III. ch. 41.
4. Receipt of alms.
5. Ideocy.

The

The cases in the following collection, do not contain questions upon all the foregoing heads: For although questions arose in the cause under all of them, many were either not worth reporting, as depending on facts without any doubt of the law; or could not, in my judgment, be so clearly stated as to furnish proper examples upon the subject. The reader will therefore consider the collection, as composed of all the cases in the cause that (with the exceptions beforementioned) could be brought to serve as examples, upon the particular points.

I. CASES of MISTAKES and ERRORS on the POLL.

T. Ayres. THE vote of Thomas Ayres was entered in the book for Lord Offory *only*. The counsel for the petitioner offered evidence to prove this to be a mistake of the poll clerk, and that he, in fact, declared his vote for both Lord Offory and Mr. St. John.

This vote was a subject of debate in the former case of Bedfordshire, and is mentioned in pa. 377 of the first volume, under the name of *Eyre*; where the reader may find the arguments used upon that occasion, to obtain a hearing of the case then, which the Committee on that petition (which was confined to the *return only*) refused to Mr. St. John.

The counsel for the sitting member now informed the court, that as they had other objections of the same sort to the poll on their side, it was indifferent to them, how the Committee might choose to proceed upon them. In point of form, they objected to the admission of evidence to prove the case, merely in order to obtain some determination on the point. The counsel on both sides agreed to make no arguments upon it, and to leave it upon the effect of those
which

which had been addressed to the former Committee * upon the same vote.

Mistakes,
&c. on the
Poll.

The Committee, after deliberating, resolved,

T. Ayres.

That it was competent to them to bear evidence to correct an entry on the poll.

Hereupon the counsel called, as a witness, one who had been a bystander on the hustings at the time when Ayres gave his vote. This evidence was opposed by the sitting member's counsel, who contended,

That the evidence of witnesses, or by *parol*, ought not to be received to contradict the poll book: Because the statute 18 Geo. II. ch. 18. by allowing check clerks and inspectors to attend for the parties at elections, for the purpose of watching the poll, had plainly intended to render them the only authority to resort to, in case of any mistakes in it, whether accidental or designed. That the act in this respect had a consideration of the violence and animosity with which contested elections are carried on, and kindly protects the individuals interested, from the danger to which their consciences would be exposed, if in such temper of mind their oaths were to be taken; and therefore directs a written instrument to be preserved on both sides, for the purpose of determining these disputes. That

* See from p. 377, to p. 381, of vol. i.

Mistakes,
&c. on the
Poll.

the proper and only evidence for the Committee, would be the check books verified by the clerks who made them, who are in the statutes called *Inspectors* of the poll, and seem to have been instituted for such purposes *.

The counsel for the petitioner denied, that the statute could have any such design in appointing inspectors of the poll, and permitting check clerks to the parties. They said, that this was merely a regulation for the satisfaction and security of the candidates, during the election, and contended, That the evidence of any person present was as proper for this question as that of the check clerks; and that the above resolution of the Committee, necessarily led to the hearing of such evidence. That a poll-book was no record in law, as the counsel on the other side wanted to consider it, and a check book could not be considered in its legal effect, otherwise than as a memorandum from whence the clerk might refresh his memory of the fact, when called as a witness; for that it would not be admissible of itself, and without being authenticated by the clerk who wrote it. Its use in evidence would depend on the clerk's examination, and thus *parol* testimony would be received.

* See stat. 7 & 8 Will. III. ch. 25, sect. 3. and 18 Geo. II. ch. 18. sect. 9.

This

This shews an inconsistency in the objection; which is founded on a position that admits the testimony of the check clerk, but at the same time denies the competency of *parol* evidence. Mistakes,
&c. on the
Poll.
T. Ayres.

That inspectors or check clerks were not sworn to their books, and were equally partizans to those for whom they attended, with any other of their supporters; that their books were always in the custody of the parties, who might alter them at pleasure; which shewed, how unfit they were to be resorted to as decisive evidence.

The Committee were of opinion; that their last resolution involved the present question; and therefore directed the counsel for the petitioner, to proceed with the evidence.

After the examination of this first witness, who said, he heard Ayres poll for both candidates, the counsel called Ayres himself to prove the fact. His competence was objected to by the other side. In stating and enforcing this objection, and in the answer to it, arguments of considerable length were employed: But as they were in substance much the same with those used by the same counsel in the former contest, upon a similar case which I have reported in the first volume, I forbear to mention them. The reader will find these arguments employed on the case of Edward Bennet, in vol. i. p. 384 to 392.

Mistakes,
&c. on the
Poll.

The decisions, however, were opposite to each other. The former Committee thought the voter an incompetent witness: But the present Committee determined,

That Thomas Ayres should be admitted to give evidence, for whom he voted at the election.

Ayres, when examined, said, he polled for Lord Ossory and Mr. St. John.

On the part of the sitting member, they produced the check books of both candidates, which were the same, as to Ayres's vote, as the entry in the poll-book; and the counsel relied upon their authority against the evidence given on the other side. But a doubt arose on the appearance of the entry in Mr. St. John's check book, in which there was an erasure; "*Ossory and St. John*" appearing to have been written at first, and the latter name afterwards scratched upon by a knife. The book had been delivered into court as evidence by the petitioner's agent, in consequence of a notice from the sitting member to produce it; and the check clerk was not present. The book in this part not being looked at, till the sitting member entered upon his evidence in answer, the erasure was not discovered till then. The counsel for the petitioner then insisted, that the check clerk should be called by the sitting member to explain this, because the book made part of the sitting member's evidence.

The

The counsel for the sitting member said, they did not want his testimony, and would not call him: That the check book being the party's act, it bound him in this case, because he ought to have known its contents, and to have been prepared accordingly.

Mistakes,
&c. on the
Poll.

T. Ayres,

Hereupon the Committee came to a resolution,

That the check book, having been delivered in to the Committee, is already admitted as evidence; and if the party who delivered it in, should wish to controvert or explain any entry in the check book, it is incumbent on them to produce the clerk.

The dispute here was directed to the expence of sending into the country for the witnesses, which the party who wanted his testimony wished to avoid.

He was afterwards called on the part of the petitioner, but his evidence did not explain the doubt.

The Committee resolved,

That Thomas Ayres should be put upon the poll for Mr. St. John.

The vote of William Day was entered on the poll for Oflory and *St. John*; which was alledged to be a mistake of the clerk in the second name, in the same manner as in the last case; the vote having been given for Lord Ongley instead of

Mistakes, St. John. The voter himself related the fact;
 &c. on the Poll. in which he was confirmed by persons who were
 present, and by other circumstantial evidence;
 W. Day. together with the entries in the check books of
 both parties, which were in the names of Offory
 and Ongley.

The Committee directed this vote to be struck
 off Mr. St. John's poll, and added to Lord
 Ongley's.

R. Taylor was described on the poll as voting for the peti-
 tioner, for *a house and land*, in the occupation
 of William Day. What Day held was a close
 of land without a house, and of an under-value
 viz. 30 shillings; which furnished the sitting
 member with an objection to him. But the voter
 had a house near it, let for 30 shillings, occupied
 by another person. The counsel for the peti-
 tioner, when it came to their turn to requalify
 their votes under objection, offered the evidence
 of the voter to prove that at the poll he could
 not recollect the name of the occupier of his
 house, and that the poll-clerk told him the name
 of *one* tenant was sufficient, which occasioned the
 entry to be made as above stated. This was
 opposed by the sitting member on two grounds:
 First, as being contrary to the resolution, formed
 in an early part of the trial, upon *Odell's* case,
 (hereafter mentioned under the head of Value)

for

for adhering to the description given in at the poll: Secondly, That the voter himself was not a competent witness to prove this case. In maintaining this latter ground, the counsel attempted to distinguish it from the case of *Ayres*; but unavoidably fell into the same line of argument which had been unsuccessful there, and were stopped by some of the court, who recurred to the terms of that resolution. They still argued for a distinction of the two cases; that in the former, there was no doubt about the voter's *right*, but only *how* the vote was given: But that here the *right* of voting was in question; because the stat. 18 Geo. II. c. 18, by requiring a particular description of the freehold, necessarily made that essential to the right; and this was what the voter was called to establish. And they contended too, that the precedent in *Odell's* case was in point in their favour on the first ground. It was said in answer hereto, That this rule could not be applied; because here the dispute was, *how* the vote was given, and *how* the voter described his freehold; not whether he should abide by the description given in: That the rule referred to, had proceeded upon that fact as ascertained which here made the only doubt, and therefore evidence ought to be received to explain it. For answer to the other

part

Mistakes,
&c. on the
Poll.

R. Taylor

Mistakes, part of the argument, the counsel referred to
&c. on the the opinion given in Ayres's case.
Poll.

R. Taylor The parties were informed by the chairman,
That the Committee were of opinion, *That they
had already decided this question, when they resolved
to admit evidence to correct an entry on the poll, and
allowed the voter himself to be called to prove a
mistake made by the poll clerk, with respect to his
own vote.*

The counsel for the petitioner were then directed to proceed in their evidence. They called no other witness besides the voter; who said, that he gave in the names of both his tenants to the poll clerk; though, in the oath, he repeated the description entered on the poll; and the check books of both parties confirmed the entry in the poll-book.

Ja. Smith. The case of James Smith, who also voted for the petitioner, was like that of Robert Taylor; and the same evidence was offered to prove it. It was brought on by the petitioner immediately after the case of Taylor. The counsel for the sitting member again resumed their objection to the competency of the witness, and urged the Committee to reconsider their opinion, if it were only to prevent the opportunities it would give for perjury, where men were disposed to it; and also the increase of trouble that would be brought upon

upon election causes, if it were publicly told, ^{Mistakes, &c. on the Poll.} that each man's single evidence would be received to set aside his vote.

The Committee having deliberated, declared ^{Ja. Smith.} their opinion, *That the voter might be called: At the same time they Recommended it to the counsel to avoid, in such cases, the producing witnesses unsupported by other testimony, or any concurring circumstances; as their evidence would not be likely to have weight in the decision*.*

In this case too, the check books agreed with the poll-book; and the voter was the only witness to prove the fact. The only difference between the circumstances of the two cases, was, that in the latter, the voter having two houses near adjoining each other occupied by different persons, swore to the fact stated (by mistake, by the counsel) to have related to Robert Taylor, of his forgetting the name of one of them at the poll, and his acting on the advice of the clerk.

* In the Cricklade Committee, the admission of the evidence of a voter's declarations as to his *right*, after having voted, was opposed on one side, and the question was argued by the counsel; after which the court resolved, that the evidence was admissible. It was in the case of an objection to a voter as being a copyholder, who had said, that the estate he voted for was copyhold. Similar evidence of a voter's declarations, was admitted in other cases in the same Committee.

The

Mistakes,
&c. on the
Poll.

The Committee gave credit to one of these men, but not to the other; for, in their decisions, Taylor was allowed to be a good vote, but Smith was struck off the poll.

W. Saunders,

His freehold was described to lie at Houghton: *This* was proved, on the part of the petitioner, to be under value. In support of the vote, one witness proved, that the voter at the poll declared the situation of his freehold to be at Houghton and Studham; and that he spoke both names loud enough to be heard by the clerk. The value of his lands in both places, taken together, amounted to more than 40 shillings. This evidence was not contradicted*. The vote was held

Good.

* Yet there seems to be a strong objection to the admission of such explanations, viz. that the party objecting, has no means of inquiring into the circumstances of the estate added to make out the vote, so as to make objections to it; unless it happens, that many days intervene between the time of giving the evidence, and that of receiving the other party's reply to it; which depends on accident. On the other hand it may be said, It is harder that a man should lose his vote, by the officer's mistake, than that the candidate should lose an opportunity of attacking it. In the same manner, where the clerk enters a voter's name different from his real name, as was often the case in this election: For instance, *Cobb* was entered *Cook*; here, the objection that no such person was assented, was all that the party objecting could be expected to make to *Cook's* vote.

Abraham

Abraham Dicks. The freehold was described to lie at Toddington, in the occupation of Sarah Dicks and others, and was objected to as no freehold, and not assessed. The voter's property in Toddington was proved to be copyhold; and his name was not in the assessment of that parish. In support of the vote, a witness swore, that he went up to the poll with Dicks, and that the latter named *Westoning* as the situation of the estate, and spoke audibly enough. In *Westoning* the voter was duly assessed. The entries of the two check books agreed with that of the poll.

Mistakes,
&c. on the
Poll.

Abraham
Dicks.

Upon the credit of the witness, the vote was held *Good*.

William Smith, another voter in the same circumstances, was held good upon the credit of the same witness.

Charles Chester, Esq; described his freehold to be lands, in the occupation of *several persons*.

Charles
Chester,
Esq;

The stat. 18 Geo. II. c. 18, in the form of oath for freeholders, requires the voter to specify the nature of his freehold estate; and if consisting in messuages lands or tythes, then to specify *in whose occupation the same are*; and if in rent, to specify the names of the owners or possessors of the lands, out of which the rent issues. The counsel for the party objecting contended, That the statute required the voter to specify

Mistakes, specify the occupier of the freehold *by name*; that
 &c. on the the reason for such particulars in the description,
 Poll. namely, the furnishing means of discovery in
 Charles cases of fraud, would have no effect; and it
 Chester, would be as well to give no particulars at all, as
 Esq; any description so general. On the other side,
 it was contended, That the intention of the
 legislature was sufficiently complied with in this
 mode of description; because the situation and
 quality of the freehold, and the person of the
 freeholder, were the things which distinguished
 it in the fittest manner, for objection and inquiry;
 and the voter had named these particulars: That
 the name of the tenants was a very uncertain
 description of an estate, because they changed
 so often: That, further, the statute did not de-
 clare a vote, given without an observance of the
 regulations prescribed by it, void; and, there-
 fore, though this case should be thought a dis-
 obedience of the law, still it was not a sufficient
 cause for avoiding the vote.

GOOD.

Jn. Oliver — Polled in the book for the hundreds of Clifton
 and Wixamtree, for a freehold at *Clifton* parish.
 In this parish he had no freehold. It lay at
Shillington, and he was assessed for it in the hun-
 dred of Flitt; the part of Shillington parish
 where it lay, being in that hundred. The voter
 was examined to prove, that he declared to the
 poll

poll clerk, that his freehold lay in Shillington. ^{Mistakes,}
 But the check books were the same as the poll ^{&c. on the}
 book: ^{Poll.}

The statute 18 Geo. II. ch. 18, f. 7, directs ^{J. Oliver.}
 the sheriff to allot a number of booths for taking
 the poll, and to affix upon the booths the names
 of the divisions for which they are allotted: To
 appoint a clerk for each booth to take the
 poll; and to make out for each of them, a list
 of the towns, villages, parishes, and hamlets;
 lying wholly, or in part, in that division for
 which the booth is designed. By sect. 8, of this
 act, No person is to be admitted to vote for a
 freehold, sworn to be at a place not men-
 tioned in the booth list, unless it lies at a place
 not mentioned in any of the lists.

The statute 10 Anne, ch. 23, f. 5, directs the
 clerk to enter the freeholder's place of abode,
 and also the place of his freehold, as he shall de-
 clare the same.

The counsel, in support of the above vote,
 contended, That as the voter had named the
 proper parish where his freehold lay, the mistake
 of the proper hundred ought not to vitiate the
 vote. It is the clerk's duty to poll the voters in
 the proper hundred; but his not doing so ought
 not to occasion the loss of the vote.

BAD.

Thomas

Mistakes,
&c. on the
Poll.

Th. Lane.

Thomas Lane voted for land in *Barton* parish. His freehold lay in the adjoining parish of High-
am Gobian, and was assessed there. The voter's
house was very near Barton: Letters were directed
to the tenant who occupied it, at Barton turn-
pike; and his family went to Barton church.
The counsel objecting to the vote contended,
That it could not be supported without shewing
a freehold situated as described, and assessed in
like manner: That if it were held otherwise, the
design of the law in requiring local descriptions,
would be defeated; because the opposite party
must direct their inquiries according to the de-
scription given in.

In support of the vote, it was said, That per-
sons were not to be expected to give exact tech-
nical descriptions of their property, in the hurry
of a county poll; that all the ends of the law
would be answered, by describing an estate ac-
cording to the place by which it was known, in
the common intercourse of life; and the voter
having done so here, it ought to be held suffi-
cient: That it was not necessary to describe a free-
hold by the name of a parish, but, in general,
by the *place*; and accordingly the title of the
column for situations in the poll book is, *Where
the freehold lies*, not *Parish* where.

BAD.

Thomas

Thomas Love voted for house and land in the occupation of I. Cunningham. This tenant occupied a house, with a small garden annexed to it, for which and for the fruit of an orchard adjoining, he paid 32 shillings rent: This was all *he* occupied. But there was a little field adjoining belonging to the voter, occupied by another tenant, at the rent of 20 shillings.

Mistakes,
&c. on the
Poll.

T. Love,

Against the vote it was contended, That the field ought not to be reckoned as part of the value, because not within the description on the poll; that though it might be reasonable, and had been allowed by the Committee, to explain an imperfect description, where *house and land* with the occupier of a house *only*, had been described; yet where the tenant named actually held enough to answer the description as to him, as was the case here, (for he occupied a house *and garden*) such latitude ought not to be permitted; but the voter must suffer for his negligence, because he had in this case given a complete description, and ought to abide by it.

On the other side it was said, to be absurd to suppose, that the voter could have intended any other *land* by his description, than the field beforementioned; for a little yard or garden of a house, is commonly understood to be included in the term *house*. It therefore amounted to that sort of imperfect description, which it was rea-

Mistakes,
&c. on the
Poll.

T. Love.

sonable to allow to be explained, by adding to it such parts as naturally came into the contemplation of the voter, at the time of polling: That the receiving such evidence with this distinction, was not inconsistent with the spirit and meaning of the resolution, to abide by descriptions on the poll; by which it was meant, that voters should not involve *different estates* in the description of *one* only, so as to defeat the end of the law, that requires particular descriptions for the purpose of furnishing means of inquiry to an opponent.

GOOD.

Stanley
Burrough

—polled in the book of the hundred of Flitt. His freehold lay in the hundred of Redbornstoke. The objection to him was included in the party's list of the latter hundred. In proceeding through the former, the sitting member, who objected to him, offered evidence in support of the objection. The petitioner opposed it, alledging, that it was necessary to adhere to the terms and order of the objections in the list.

On the other side it was said, that this would force them into a dilemma, that would prevent *all* inquiry into the vote. That it was not necessary to distinguish objections by hundreds; and if the proceedings here had been, as those

of

of G
hundr
point:
not to
mere f
To
had fu
stated o
of Flitt
tiate, b
dred, (C
in the F
shire ca
a differ
observed
regularly
ther to
having g
The C
That a
bundred,
It seem
the Com
not enter
wards, in
hundred
counsel re
of this obj
them, tha

of Gloucestershire and Bucks, not divided by hundreds, there would be no difficulty in the point: Therefore the justice of the case ought not to be excluded by a matter not only of mere form, but of accident also.

Mistakes,
&c. on the
Poll.

S. Bur-
rough.

To this it was replied, That the petitioner had suffered by the same circumstance; having stated objections to three votes in this hundred of Flitt, which he was not suffered to substantiate, because they had voted in a different hundred, (one of those already passed) and were not in the Flitt poll book. That in the Gloucestershire case, though the proceedings had been in a different form, the same regularity had been observed; for the course there taken, was to go regularly through a book or hundred; and neither to go out of it, nor to return to it, after having gone through it.

The Committee were of opinion,

That as the votes had not been objected to in this hundred, the objections could not be proceeded on.

It seemed to be understood, as the sense of the Committee, that the sitting member could not enter at all upon this objection. But afterwards, in proceeding through the book of the hundred of Redbornstoke, the sitting member's counsel renewed their attempt to give evidence of this objection. But the Chairman informed them, that according to the reasons upon which

Mistakes, the Committee had formed their first opinion,
&c. on the evidence could not be received.
Poll.

D. Rey-
nolds.

Rev. Decimus Reynolds went to the polling booth of the hundred of *Flitt*, and there was sworn, and declared his vote for Lord Ongley, for a freehold at Thurleigh which is in the hundred of *Willey*. He also possessed a freehold in the hundred of *Flitt*, but said nothing of that at the poll. There was no entry of his name in the poll-book, or in either of the party's check books. After he had (as he thought) given his vote, he was told at the polling place, to go to the *Willey* booth; but he did not go, thinking his vote had been properly taken down in *Flitt*.

It was contended, that the Committee ought not to allow this vote to be added to the poll, because the voter had acted under a mistake of what it was his duty to know, and therefore he ought to be answerable for it. That this was really the case in the understanding of the parties, was evident, from the circumstance of Lord Ongley's own check clerk's having made no memorandum of the fact in his book. That the poll clerk had done his duty, and given him the proper directions for voting, which he did not choose to follow. The tender of his vote at the wrong booth, was, according to the provisions of the stat. 18 Geo. II. ch. 18. as use-

less

less as if it had not been made; and his being sworn there, was equally insignificant.

Mistakes,
&c. on the
Poll.

On the other side it was said, That the omission now complained of, was owing to the negligence of the poll clerk, and not of the voter; because the oath ought not to have been tendered to any one, whose name, as a voter, was not to be duly entered at the same time. Having been sworn, and having given his vote, the voter could not lawfully or with any propriety have polled at any other booth, where he must have sworn that he had not been polled before. Under these circumstances, the case stands as if the vote had been entered on the poll; for it is just and reasonable to consider as done, that which it is the duty of any officer of the law to do, where an innocent party is to suffer by the negligence. Then the question will be, whether a vote given in a wrong hundred shall be rejected. This was never yet acceded to. The act requiring a poll by hundreds, is only directory to the sheriff, but does not annul the votes received differently. In this election too, there have been instances of such votes being allowed, or not objected to, for this cause. There have been cases, where the assessment of the freehold voted for, has been shewn in a different hundred, as an objection to a vote, but this objection has proceeded on a different principle;

D. Reynolds.

Mistakes, it is then an allegation, that the estate *actually*
 &c. on the *voted for* is not assessed, and the objection is
 Poll. *in fact* made to the want of assessment.

Not added to the poll.

II. CASES of an INSUFFICIENT ESTATE.

Quality
 of the
 Freehold.
 J. Con-
 quest.

James Conquest voted for the petitioner under the following title. He married a widow, to whom and her former husband the estate in question had been devised in jointenancy, with remainder to her in tail. Previous to his marriage, a deed was made between him, and the wife, and a friend of hers, R. V. in which Conquest covenanted with R. V. not to intermeddle with the rents and profits of the estate, and that they should remain to the separate use of the wife—that R. V. should receive the rents for this purpose, and have the sole management of the estate, subject to the wife's controul: That the wife might devise and otherwise dispose of it, as she pleased, and he would join in all necessary acts for rendering her disposal effectual. There was a receipt of rent by the wife produced in evidence by the tenant, who was called as a witness. He said, he paid the rent to the wife.

The

The objection to the vote was supported by the following reasons: It was said, The beneficial freehold, not the mere *legal* estate, is that which gives the vote. This consists either in a man's own occupation, or in that of his tenants. Conquest, though by the marriage he became nominal owner, has neither of these: For the deed before stated made R. V. a trustee for the wife alone, and if a bill in Chancery were filed for the purpose, there would be a decree given for a conveyance of the legal freehold to R. V. pursuant to the covenants in the marriage articles. Perhaps upon the marriage it was transferred to him *ipso facto*. But admitting this point to be questionable, still as Conquest has no right to receive any profit from the land, it cannot be said he has a freehold of the value of 40 shillings a year.

On the other side it was said,

The deed, as far as relates to the voter, consists only of covenants on his part before marriage; at that time he had no right whatever to the estate, and therefore he transferred no interest in it by his covenants. But by the marriage he became seised of the legal estate of his wife. The wife might, under this deed, have directed her husband to receive the rents, and the court ought to presume this to be the case between husband and wife; or that she transfers

Quality
of the
Freehold.

J. Con-
quest.

the rents to him, till the contrary be proved; for the producing *one* receipt only in the wife's name, is not sufficient to rebut this presumption of law. Though the wife, by means of a bill in Chancery, might inforce the covenants entered into by her husband, yet till that power is executed, he enjoys all the consequences of his right by marriage; and it is enough for the present purpose, that these covenants are not actually inforced. R. V. is not made by this deed a *trustee* to whom an estate is conveyed for certain purposes; but merely a *covenantee*: For the word *trust* mentioned at the end of the deed, will not give him that quality.

BAD.

James
Smith

—had been five years in possession of his freehold under the following circumstances: It was part of a larger estate devised in his father's will to his elder brother Thomas, in trust for payment of legacies to the younger children. Thomas refused to hold the land subject to this trust; in consequence whereof, the younger children took possession of certain parcels in satisfaction of their legacies, with the consent of the elder brother: This was one of them.

In objection to the vote it was said, That though an equitable interest was in some cases sufficient to make a vote, yet it was requisite to

be

be an equitable *freehold*; that here the interest, ^{Quality of the Freehold.} till the legacies were paid, resembled more the ^{James Smith.} case of a judgment creditor, than that of the actual owner of the land.

It was said in answer, That in cases of a devise in trust like this, the regular way was to sell the estate to raise money; but the *Cestui que trust* has it in his option to take the estate subject to the charge, and prevent the sale. Where this happens, it is in substance a sale to the legatee; and a court of equity would decree a conveyance from the trustee: That in this view the voter was to be considered as a purchaser for a valuable consideration; that his title was good against all persons but the trustee; and even against him in equity: That here the trustee's acquiescence removed every ground of objection to the title, as far as the right to vote could come into consideration.

Good.

Matthew Handcomb had been in possession ^{Matthew Handcomb.} of the freehold, for which he voted, about 34 years; for the first ten years of which he paid rent for it: Since that time, the owner not having been heard of, no rent had been demanded of him or paid. This was the whole of the voter's title.

It

Quality
of the
Freehold.

Matthew
Handf-
comb.

It was argued in objection to this voter, That the circumstances proved him to hold merely as a tenant to the true owner, whenever he might return, to whom he was accountable for the rent: It was therefore unlike cases in which length of possession is construed into a title by presumption; because the presumption there is resorted to for want of other evidence: But here it cannot arise, because there is evidence to the contrary. Any length of possession may be explained away by circumstances shewing the cause of it. The utmost effect of this voter's possession, would be to defend himself in an ejectment; though that might be doubted: For he has not held adversely to his landlord. But a true freeholder ought to have the right of property in his estate.

It was said in answer, That the voter's possession was adverse, because he acted as owner by swearing to his freehold in the land. That a title that would be sufficient in ejectment, was surely enough to make a man the owner to every purpose, short of an action for the right; and while such possession remained unquestioned in that shape, it was to be presumed unquestionable. If no interest had been paid on a bond for 20 years, the law presumed it satisfied. Here a much longer period remains a blank with respect to the former owner; which may well justify the pre-

presumption of some conveyance or release to the present voter. The principle of law, upon which this rule of presumption is founded, is stated by Lord Mansfield, in the case of Eldridge and Knott, Cowp. 215, in these words: "A grant, and even an act of parliament may be presumed from great length of possession: Not that in such cases the court really thinks the grant has been made; but they presume the fact for the purpose, and from a principle of quieting the possession." And, in the same case, Judge Aston says, "A presumption from mere length of time, which is to *support* a right, is very different from a presumption to defeat a right." Which last observation is very applicable to the case of this voter, who calls in aid this rule of presumption to support his right.

Good.

Robert Saunders voted in right of his wife's freehold, whom he married after the election began, and before he voted.

Good.

John Jackson had agreed, before the election, to sell his freehold from Lady Day 1784, which was 13 days before the election commenced; but he would not execute the deeds till after the election, because he had promised to vote.

After

Quality
of the
Freehold.

John Jack-
son.

After the election he executed the conveyance, which bore date 25th of March preceding, and an attornment of the same date, as tenant to the purchaser from that day.

It was argued against the vote, That the real interest in the estate was transferred to the purchaser, at the time mentioned in the deed: That the subsequent execution of it confirmed the first agreement, and related back to the date, so as to give the estate completely to the purchaser from that time: That the voter's conduct proved that he had not a freehold *bonâ fide*, and was a fraud upon the election.

On the other side it was argued, That the voter was at liberty either to confirm the contract, or to disagree to it; and till it was confirmed, he remained the only possessor of the estate: That, besides, the agreement was made with an exception to the circumstance of voting, which was lawful, and no fraud: That an estate passes on the delivery of the deed of conveyance, and not at the nominal date of it; and the relation back is not to vitiate intermediate acts valid at the time.

BAD.

Ja. Taylor —voted for a rent-charge. He was school-master of Sharpenhoe, and under that appointment received £.10 a year for teaching eight poor

poor boys, under a will made in 1686, ^{Quality of the} whereby the rent-charge was devised for the ^{Freehold.} purpose. The operative words of it were these, ^{Ja. Taylor} viz. "The schoolmaster and children, from time to time to be put in and placed there, by the approbation and good liking of J. N. and his heirs." There were two objections to the voter; 1. That he had no freehold; and, 2. That he was not assessed. The Committee thought the vote bad; but, as they did not declare whether their judgment related to the want of due assessment, or of freehold, I forbear to state the particular arguments of the counsel on the case. Two recent instances in which the masters of this school had been removed, without any cause assigned, and which they had submitted to, were urged in support of the objection, as a proof that the appointment was understood to be held during pleasure, and therefore no freehold. The other side contended, That these ejected masters did not know their right, and that the court of King's Bench would have restored them by mandamus, if they had applied for it.

William Irons voted for a rent-charge. His ^{W. Irons,} freehold was in his appointment to be schoolmaster of the free-school at Houghton Conquest, under Sidney College Cambridge, in right

Quality of the Freehold. right of which he received an annual salary out of lands charged with the payment of it. The appointment recited, "That no person qualified, according to the will of the founder, had offered himself for the place; and that, therefore, the master and fellows, at the request of the rector and inhabitants of the parish, did appoint William Irons to supply the place, till a person properly qualified shall offer."

W. Irons.

This was contended to be an occasional and temporary appointment, of one avowedly incapable, by the institution of the school, to hold the place; from which he must be discharged immediately, upon the application of a person duly qualified; and that therefore the appointment gave the voter no freehold in the office.

On the other hand it was said, That the appointment was absolute as to holding the office, and that it might possibly last for life, although liable to such removal; and that this possibility gave the holder all the consequences attached to this situation.

BAD.

In the case of the two schoolmasters, Gardener and Mason, hereafter mentioned under the head of Assessments, the appointment was in the lord of the manor of Stratton; who thought that he had not power, by the institution, to remove the

the masters he had appointed. Those votes were held good. I have classed them under the head of Assessments, because the objection chiefly insisted on against them was to the want of assessment. Quality
of the
Freehold.

John Trotman. In support of the objection, J. Trotman the petitioner's counsel called the tenant of the estate, who said, he considered one Wells to be his landlord, to whom he paid his rent, and who had let him the estate at the Christmas before the election: That it had belonged to William Hawkins, then dead. On the part of the sitting member, Hawkins's will was produced, whereby the estate was devised to the voter; and the counsel argued, that from hence it ought to be presumed, that Wells was only a tenant to Trotman; and that the petitioner, in order to substantiate the objection, should have gone further, and given evidence of a sale by him to Wells, if Wells really were the owner.

Good.

Philip Turner voted for a rent-charge on the estate of the Rev. Mr. Hawkins. The objections to him were, 1. No freehold; 2. Not duly registered; 3. Not duly assessed to the land tax. The voter had the appointment of schoolmaster at Ampthill, given him by Mr. Hawkins the rector;

Quality
of the
Freehold.

Philip
Turner.

rector; under a deed made in 1740, whereby an estate was settled on the rector for the time being, on condition that he should "apply out of the rents, £.5 a year, to *one or more* schoolmasters or schoolmistresses," for educating 16 children. The rector, being called as a witness to speak of the nature of the appointment, said, he did not know that he was impowered to turn out a schoolmaster who had been once appointed to the place; and knew of no instance in which any one had been displaced.

The voter was not assessed for this rent-charge, nor was it registered as an annuity. The rector was duly assessed for his benefice.

It was argued in support of the objections, That Turner had not a *certain* freehold of 40s. a year; for as the rector was authorised to appoint *one or more*, he might, in the exercise of this discretion given him, appoint three schoolmasters, whose shares of the salary, in that case, would be less than 40s. each.

In support of the vote, it was said, That the bare possibility of this case, which had not happened in fact, could not affect the voter's present actual right to the whole of the £.5 a year.

Good.

William
Dickins

—voted for house and land at Keyfoe. He was minister of a dissenting congregation there, and had

had held the place upwards of 20 years; in right ^{Quality} of which, besides voluntary contributions, he ^{of the} Freehold. enjoyed two houses and an orchard, one of which ^{William} houses was let for £.2 14s. a year. For these ^{Dickins.} he was regularly assessed to the land tax.

The circumstances given in evidence, respecting this vote, were as following, viz. Some land was purchased by persons who acted as trustees for the congregation in 1741, to build a meeting house for public worship and a house for the minister. Since that time, there had been a regular succession of ministers appointed by the congregation; that is, by such of them as received the communion of their church. There was no instance of any one of the ministers having been removed after his appointment; but more than one had been rejected, after more than a year's service in the meeting, in a state of trial. Two members of this congregation who were examined, said, they did not understand that the congregation had a power to remove their minister.

The counsel for the petitioner, who objected to the vote, argued,

That the voter could not be considered to have a freehold estate for life, but only a place with perquisites annexed to it, during the good will of the congregation, and therefore not giving a right to vote. That the function of a

Quality
of the
freehold.

William
Dickins.

Protestant dissenting minister, before the Toleration Act, 1 Wm. and Mary, ch. 18, was unlawful, and subject to penalties: At that time, therefore, he could acquire no right or privilege by his function. The alteration made by that statute does not confer an *establishment* upon dissenting ministers, but simply a *toleration*, by excusing them under certain conditions, from the penalties of former laws (D.) But if they claim a freehold interest in their appointments, they must shew, either that the Toleration Act has the effect of an establishment, or that the principles of the common law support this claim. If the latter were the case, it might easily be supported by adjudged cases, or by doctrines advanced in courts of justice before the revolution: Whereas none such are to be found. The favour shewn them by the courts since that period, is derived wholly from the above statute; but it has extended no further than to protection merely. The cases in which their rights have been brought in question in the King's Bench, have been such as required the assistance of that court against wrongdoers, to which all the king's subjects are equally intitled; but the judges have never gone so far as to declare their places to be freeholds. In the case of the King and Barker, 3 Burr. M. 1265, (which perhaps may

may be relied on by the other side) the court granted a *mandamus* to place a dissenting minister in his function, which another unjustly withheld from him; but this did not proceed upon an inquiry into the nature of the office, nor did it decide what right the party had acquired by his appointment. But the court granted a *mandamus* to preserve the public peace against trespassors, there being no other remedy for the party aggrieved, and to prevent a failure of justice. If in any case the court had granted a *mandamus* to *restore* a dissenting minister, clearly turned out by his congregation, it might, perhaps, warrant the argument which must be used in support of the vote, because it would shew that the station was considered to give a permanent interest to the minister. But whatever the usage of the different congregations may be, in point of law the office depends upon the pleasure of the persons composing them. They are all voluntary associations, and may be dissolved when the individuals please: If they cease to meet, the ministry ceases with them; for where there is no congregation, there can be no pastor.

The present question is not new; for it occurred in the case of Gloucestershire, in 1777: And that Committee, after a full investigation of the subject, decided against the right of such

Quality
of the
Freehold.

William
Dickins.

ministers*. This decision ought to have considerable weight in the minds of the Committee, if they should think the point doubtful.

In support of the vote, the following arguments were used:

Either the place in question is held for life, or during pleasure; for there is no circumstance from whence an appointment for a limited term can be collected. A power to remove for misbehaviour, is necessarily incident to all offices, even the greatest; and therefore the voter's being liable to that sort of removal, does not at all diminish his right: He is subject to that in common with every other man. If, therefore, he holds his place and his house during good behaviour, his interest in them is that of a freehold.

In order to make out this position, it is not necessary to argue, that the act of Toleration raised the dissenting ministers into an *establishment*, in the sense in which this word is applied to the national church, though some learned men have thought it did (D.) It is sufficient, that their function is lawful; for being under the protection of the law, legal rights may be acquired by it.

* In the case of Mr. Samuel Thomas, who enjoyed 15l. a year of real estate, granted in 1720 to the minister of the congregation of Frenchay, payable "to the minister of the chapel there, so long as it should be tolerated." Gloucestershire case, p. 95, 169, 176. And in another vote of the same sort in p. 193 of that book.

The

The principles upon which the court of King's Bench has protected them, give a convincing proof that the judges consider them to hold their places during good behaviour; that is, upon the same terms by which every other office for life is held. It is absurd to suppose, that the court would grant a mandamus to admit a man to an office held during the pleasure of others, and from which they might remove him as soon as they had obeyed the writ by admitting him. No case of this sort can be produced; therefore the case of the King and Barker does prove the right now contended for, though that mandamus was to *admit* only; and such a decision of a point of law, ought certainly to have more respect paid to it than that of a Committee, howsoever respectable. Lord Mansfield, in delivering the judgment of the court in that cause, puts the case of a dissenting minister upon the same footing with that of "a *lecturer, preacher, schoolmaster, curate, chaplain*, and considers them intitled all alike to the writ in the same circumstances. But in a later case, which is not yet in print, the court went further, and actually granted a mandamus to *restore* a minister of a dissenting congregation, who had been turned out. It happened in Easter term, 1780, one Dr. Wachsfell had been regularly appointed by a congregation of German Lutherans in London to be

Quality
of the
Freehold.
William
Dickins.

Quality
of the
Freehold.

William
Dickins.

their minister; and under that appointment became intitled to a house and stipend. Afterwards he gave offence to his congregation, and they turned him out. He applied to the court for a mandamus to be restored, which, after a great deal of time employed in considering the question he obtained.

Another case of the same sort, under the name of Chadwick against Smith, was argued in the King's Bench, in Easter and Trinity terms 1783. It arose out of a dispute for the ministry of a dissenting congregation at Leek in Staffordshire. One minister had got possession of the pulpit; the other claimed the election, and moved for a mandamus to be admitted. The court, previous to granting the writ, directed an issue to try the merits of the election, between the candidates; and though no mandamus actually issued afterwards in support of the verdict upon that trial, yet there was no doubt of the right and propriety of granting it accordingly; which the court were prepared to do, if the losing party had not submitted to the verdict in the first instance.

At Manchester a dissenting minister disliked by his congregation, for many years kept possession of his meeting house and the salary annexed to it, in direct opposition to the congregation,

gation, who tried every method in their power to remove him.

Quality
of the
Freehold.

It seems difficult to distinguish the present case from those already determined by the Committee, in favour of the schoolmasters whose votes have been allowed: For they have considered these persons to have estates for life in their offices; except where there have been particular circumstances in the nature of their appointments, from whence they might infer a discretionary power of removal to exist. In the present case there are no such circumstances: But there is one much in favour of the particular person; for he has been 20 years in possession of the estate in right of which he votes; which, in a common case, would alone intitle a man to the right of voting.

William
Dickins.

The counsel of the other side, in their reply, observed upon the case of Dr. Wachsell, That the court founded their judgment upon the fact of a division of sentiment in the congregation, as to the removal; from whence they inferred it to have been an irregular act: And they therefore upheld the minister's possession, because they saw the congregation itself disagreed upon the subject *. But this decision did not proceed upon

* This account of the determination is mistaken. It appeared that the congregation accused Dr. Wachsell of

Quality
of the
Freehold.

upon a denial of the right of the congregation to remove; but left them free to exercise the right in a regular manner, if they should think proper afterwards.

BAD.

John
Bonfield.

—His father devised an estate worth upward of £.5 a year to his second son, the voter's younger brother, subject to an annuity of £.8 a year for life to be paid to the voter. He also devised other estates to the second son; who, on agreement with his elder brother, gave up to him the estate charged with his annuity in satisfaction of it. This was only a parol agreement. The voter was in possession of and voted for this estate.

GOOD.

Joseph
Marshall

—voted for *a windmill*. The argument in support of the objection to this vote makes it necessary to give a particular account of the mill. It stood in a common field in the parish

several acts of misbehaviour and impropriety of conduct, and for this cause removed him. A few of them, but a very inferior number, were against his being removed. The reason given by the judges for restoring him, was, "because the congregation had expelled without hearing him; and had not made a proper inquiry into the charges alledged against him, by delivering them personally to him, and calling upon him for his defence."

of

of Yielding, upon a plot of grass ground, ^{Quality of the} large enough to clear the sway of the wings, in- ^{Freehold.} closed within a fence put up by the voter. It ^{Joseph} was fixed on a post, upon pattens, in a founda- ^{Marshall,} tion of brick-work. Nothing was expressly proved to shew this plot of ground to belong particularly to the voter; and nothing on the other hand, to shew that it did not.

The counsel objecting to the vote, said, That as the voter had expressly described his freehold to be a windmill, he could not have availed himself of the value of any land with it, if he possessed any; but according to the evidence, there was no reason to suppose this; therefore the question was simply, whether this windmill was a freehold estate; which they contended, it was not, but merely a chattel. That it did not follow, from the right of an heir, to take property by descent, that such property was always of a freehold nature, for there are many *chattels* which go to an heir: Thus a term of years in trust to attend the inheritance, is a chattel descending upon an heir. Comyns, in his Digest, under the title "Goods and Chattels," makes his second division of "What go to the heir." Therefore such descent is not alone a proof of freehold, if in this case the voter could prove the descent as to the mill, which however is not the case.

It

Quality
of the
Freehold.

Joseph
Marshall.

It has been determined, that a fire engine set up for the benefit of a colliery by a tenant for life, is part of his personal estate and goes to his executor. This was in the case of Lawton and Lawton before Lord Hardwicke, 3 Atk. 13. In that case a decision of the same sort of Lord Chief Baron Comyns, in a cause before him upon a cyder mill, was cited and adopted by Lord Hardwicke. An action of trover was brought for the mill by the executor against the heir, and the judge gave his opinion for the former, who had a verdict.

These cases have ascertained the law upon the subject; and it would be difficult to distinguish a windmill from the other subjects that have been considered as personal estate. The case of Lawton and Lawton, in the court of King's Bench in Easter term 1782, in which Salt pans were adjudged to belong to the heir, does not militate against this argument; because it has been shewn, that these things may, notwithstanding, be considered as personalty; and because that judgment depended on the particular circumstances of the case (E.)

In support of the vote it was said, That according to the evidence of this case, the voter must be presumed to have a right to the soil on which his mill stands; therefore no objection could arise from that quarter.

In

In the cases on which the opposite argument is founded, (if they were in point to the wind-mill) the nature of the *subject* has never been considered intrinsically, but always with relation to the *persons* between whom the question has arisen. Thus in those of the fire engine and cyder mill, the question was, whether persons who had laid out so much money as these subjects had cost, in improvement of the estate held by them, ought not to be indemnified in their property, when the estate vests in other hands: And accordingly the modern determinations founded on principles of public convenience, and for the benefit of agriculture or commerce, have favoured the executors of such persons against the successor to the land. So where a tenant has in the same manner improved an estate, the landlord has not been suffered to take advantage of it against him, or his representatives. This doctrine was ably explained by Lord Mansfield in the case of the Salt pans, to have depended on these distinctions (E.); which case is a strong authority in favour of this argument: For there the court held that the pans erected for a brine work, notwithstanding the principle of favouring trade, descended to the heir, and not to the executor.

But, if the cases beforementioned were not open to these observations, it has not been shewn
in

Quality
of the
Freehold.
Joseph
Marshall.

Quality
of the
Freehold.

Joseph
Marshall.

in support of the objection, that a *windmill* has ever been considered as a chattel in any case, or in any opinion of a judge. Therefore upon general principles, considered as a building fixed in the soil, it must be accounted a part of the freehold.

GOOD.

Value in
itself,
See p. 408.

Wm. Odell voted for house and land in the occupation of Thomas Sibley. This was proved to be let for £.1 11s. 6d. a year; but the voter had another tenement near this, let to another person for £.3 a year. In objection to the vote; it was contended that he should be bound by the description of that freehold which he gave in at the poll, whatever other estates he might possess; for it is the voter's own fault, if when he may make use of all his estates, he chooses to confine himself to an insufficient one: That if this rule were not observed, the provision of the statute for entering on the poll the particulars of the estate voted for would be useless.

On the other side, the counsel acquiesced in the propriety of this rule, and gave up the vote. Upon this the Committee desired to have an entry made of the case in their minutes, for a precedent in future. It was accordingly done in these words, viz. *If a voter gives in a freehold on the poll which is not worth 40s. a year, the*
vote

vote is to be considered as a bad one, notwithstanding he may be possessed of other freeholds amounting to more than 40s. Value in itself. W. Odell.

The provision of the statute above referred to, is in sect. 1, of stat. 18 Geo. II. ch. 18, prescribing a form of oath for freeholders, in these words:

“ You shall swear, (or being one of the people called Quakers, you shall solemnly affirm) That you are a freeholder in the county of _____ and have a freehold estate, consisting of _____ (specifying the nature of such freehold estate, whether messuage, land, rent, tythe, or what else; and if such freehold estate consists in messuages, lands, or tythes, then specifying *in whose occupation* the same are; and if in rent, then specifying the names of the owners or possessors of the lands or tenements, out of which such rent is issuing, or of some or one of them) lying or being at _____ in the county of _____ of the clear yearly value of forty shillings, over and above all rents and charges payable out of, or in respect of the same; and that you have been in the actual possession or receipt of the rents or profits thereof, for your own use, above twelve calendar months; or, that the same came to you within the time aforesaid, by descent, marriage, marriage settlement, devise, or promotion to a benefice in a _____ church,

Value in
itself. } such freehold estate has not been granted or
W. Odell. made to you fraudulently on purpose to qualify
you to give your vote; and that the place of
your obode is at in
and that you are twenty-one years of age, as you
believe; and that you have not been polled be-
fore at this election."

Timothy
Kidman

—voted for house and land in the occupation of
John Osborn. This did not amount to 40s.
But the voter's freehold consisted of two tene-
ments under one roof, one let to Osborn and
the other to Cope, both together paying £.3, 8s.
There was only one door in front of the house
for the entrance of both families; but there were
separate staircases and gardens, and in every
other respect they were separate dwellings. Cope
had a separate back door into the yard. Osborn,
who was examined, made use of the phrase *the
whole house*, when speaking of both tenements.

In objection to the vote, it was contended,
That it fell within the terms agreed upon in
Odell's case and was therefore bad. On the other
side, That this was *one* house, and the voter
having described *it* on the poll for his freehold,
the value of the *whole* house ought to be taken
into consideration, notwithstanding the tenant
named did not pay for the whole. That this
descrip-

description was sufficient to answer the purpose Value in
of the statute, as it gave the true guide to in- itself.
quiry and could not mislead.

Timothy
Kidman.

The vote was held good. In another case of one Perkins under the same circumstances, the voter described his freehold as consisting of *houses*, and it was held good.

John Gilbert, objected to principally for not J. Gilbert.
having a freehold of the value of 40s. He described it at the poll, as consisting of *houses* in the occupation of himself and others. The assessment was thus: " John Gilbert (landlord) *Himself* (tenant)." And the party objecting offered to prove that the house he *lived in*, was not worth 40s. a year; and concluded, that his vote must be rejected, because the freehold *for which he voted* was either not assessed, or under value.

The principle of the objection was admitted; but the fact, as to the value, not being in the end satisfactorily proved, the objection was not persisted in.

John Southwell married one of six daughters, J. South-
who were intitled to equal moieties of an estate well.
consisting of a malting house, two other houses,
and a few acres of land, let to a tenant for eight
guineas a year clear rent; he paying for the land
tax

Value in tax $\pounds.1$ 4s. and laying out annually on the pre-
 mises $\pounds.3$ in repairs and improvements. Thus
 J. South- including the two last mentioned sums, the sixth
 well. part amounted to $\pounds.2$ 2s.

For the support of the vote it was contended, That this sum of three pounds was to be considered as part of the rent or value of the estate, and so each share would produce more than 40s. On the other side it was contended, That it ought to be deducted from the produce of the estate, because it was no *profit* to the owner, nor received by him: That it proved the tenements to be in great decay, and their value consequently by so much the less to a purchaser.

GOOD.

John Blackwell —received 50s. a year for his freehold; but the tenant always had receipts given him for 30s. in order to be taxed in that proportion, and to deceive the assessors.

It was contended, That the voter ought not to be permitted to take advantage of his own fraud, by shewing a freehold of greater value than he had acknowledged under his hand; by the consequences of which he ought to stand throughout. That a right of voting resulted not only from a value equal to 40s. but also from contributing to the public burthens in that proportion,

portion, which the voter had, in this instance, Value in
fraudulently evaded. itself.

On the other side it was said, That this trans- J. Black-
action between the landlord and tenant was alto- well.
gether confined to themselves, and the public had
no concern in it. If the assessors had been de-
ceived by it, it was their own fault, since they
had other means of ascertaining the value than
by inspecting the receipts, and might fix it by a
just estimate of their own:—The benefit of this
proceeding resulted to the *tenant*, and was done
to favour him; for which reason the landlord
ought not to suffer by it.

GOOD.

With respect to the mode of ascertaining the
value of an estate, there was some dispute at the
bar: One side contending, That the rent was
the true criterion, where the tenement was lett;
and where it was not, the course should be to
inquire into the amount of the rent paid by the
last tenant, and whether improved since. The
other side contended, That the real worth of
the estate was the true test, according to the
meaning of the statutes; and that where the
owner held it himself, the advantages he might
make of it ought to be taken into considera-
tion: And particularly, where the owner had
asserted by an oath that such was the value, that
circumstance required to be attended to in favour

Value in
itself.

J. Black-
well.

of a common right, and in tenderness to men's consciences. No case fell out of such nicety as to make it necessary for the Committee to decide upon this matter, when it was first discussed: But some days afterwards, in proceeding upon votes in the second hundred, they came to the following resolution, viz. *That the value of a freehold, in right of which the owner votes, is the rent which a tenant would give for it; and not what the owner, occupying it himself, may possibly acquire from it* *.

Value re-
duced by
charge.

—

MANY CASES happened, in which a widow's dower was contended to be a diminution of value. Where it appeared in any of them, that the widow had not received or claimed dower for a considerable length of time, according to the circumstances of the case, the Committee considered that as presumptive evidence of a release of it.

Mortgage.

Richard
Stringer.

THE QUESTION of the effect of a mortgage upon the value, occurred on the second day of the trial. Richard Stringer, who voted for Lord

* It happened in many instances upon this trial, that the tenants being called as witnesses to prove an objection of inferior value, swore to the payment of less than 40s. in rent to their landlords, though the latter had sworn to the above value at the election.

Ongley,

Ongley, (having taken the freeholder's oath) was Mortgage. objected to as having a freehold of 9l. a year ^{R. Strin-} value, charged with a mortgage for 220l. the ger. interest of which sum reduced the annual produce of the estate under 40s. The counsel for Lord Ongley, without entering upon the truth of the fact, objected to the competency of any evidence to prove it.

They contended, That a mortgage did not constitute such a charge upon the land, as could affect the right of voting within the meaning of the election statutes. The following is the substance of their argument.

The question arises on the construction of the following words, contained in stat. 18 Geo. II. ch. 18. sect 5. viz.—“—no person shall vote—without having a freehold estate in the county for which he votes, of the clear yearly value of 40 shillings, over and above all rents and charges, payable out of, or in respect of the same.”—The same expression makes a part of the freeholder's oath.

In order to understand the legal application of the words, *rents and charges payable out of an estate*, it is necessary to consider in the first place, the legal nature and effect of a mortgage. It is a general debt, for which the personal estate is answerable in the first instance; and though the land is made a security for it, it is only auxi-

Mortgage. liary to the personal estate for its payment. The
 R. Strin- authorities for this definition are Hardr. 465, 7,
 ger. & 512. Cases in Chanc. 285, 1 Willms. 294,
 & 1 Atk. 487, in which a mortgage is so con-
 sidered by the judges in Westminster-hall. In
 the case first cited, Lord Chief Baron Hale calls
 a mortgage *a chattel*. At one time there was a
 notion, that a mortgage of land, without a per-
 sonal covenant to pay the money on the part
 of the mortgagor, might receive a different con-
 sideration; but this was determined to make no
 difference upon the point, in the case above re-
 ferred to, in 1 Willms. 294, 3 Willms. 358.
 and Prec^{ts}. in Chanc. 425. Upon this prin-
 ciple, there is no difference between the effect
 of a mortgage and that of any other debt: As
 where a plaintiff has obtained judgment in an
 action; in this case he may charge the defen-
 dant's land, by suing out an *Elegit*. The real
 estate is as soon affected in this way, as by a
 mortgage; for if the mortgagor is in possession,
 the mortgagee cannot deprive him of it without
 an ejectment; a process far more tedious than
 that of suing out an *Elegit*, after the judgment
 of which it is a regular consequence. Yet it
 never would be contended, that a defendant,
 against whom such judgment had been signed,
 had brought a charge upon his estate, reducing
 its annual value.

One

One who mortgages land for money borrowed, at his death incumbers his personal estate with the debt, if it is sufficient to pay it; and the rights of the deceased descend in different capacities; the heir being intitled to the land, the executor to the money, which by the mortgage became added to the deceased's personal estate: And the former has a right to compel the executor to clear off the burthen from his estate. While a mortgagor retains possession, he pays the interest of the mortgage as any other personal debt; nor do the parties at all consider from what fund, whether it is from the rents, or from the general personal estate, that the interest is discharged. If therefore a man's personal estate is sufficient to pay the interest of a mortgage, it can make no *charge* by which the annual value of his land can be said to be reduced. It is impossible to ascertain the effect of such a loan, without discussing the whole circumstances of a man's property; and the immense difficulty and inconclusiveness of such an inquiry, is of itself a decisive objection to that construction of the act for which the petitioner contends; for it will unavoidably lead to this inquiry in every case in which the objection may be taken. To shut out such an inquiry, would be to decide, that a man who may have mort-

Mortgage.
R. Strin-
ger.

Mortgage. gaged an estate of 40 shillings rent for 20l. having at the same time a personal property of the greatest amount, is thereby rendered incapable of voting for his freehold. The absurdity of such a position is too glaring to pass. Besides, the interest of a mortgage, considered in proportion to the rent, is not a just method of valuing an estate: For it may often happen, that by sale of a small part of an estate, the mortgage debt might be discharged; when at the same time, the interest of that debt might be equal to the clear rent received by the owner.

R. Stringer.

The words *rents and charges payable out of, &c.* are used by lawyers emphatically to express only such charges as are attached to the land *itself*, and for which that alone is answerable; such as fee-farm rents, rent-charges, rents-seck, annuities, corrodies and the like, which do not bind the *person* of the owner. This argument will be strengthened by considering the different mode of expression used upon a similar subject, in the acts of qualification for a seat in parliament. The words of stat. 9 Anne, ch. 5. and 33 Geo. II. ch. 20. are “—annual value—above *reprises*,—over and above what will satisfy and clear all *incumbrances* that may affect the same:” Under which words, an estate to give a qualification, must be clear of mortgages and every other

other incumbrance *. It is just to infer from Mortgage. hence, that the legislature thought the expressions R. Strin- used in the election statutes, were not large ^{ger.} enough to comprehend charges of such a nature as mortgages, and therefore extended them in this manner, for the particular purpose. The word *incumbrance* is much more general than *charge*, which has a technical application to the land itself; and it seems to have been designedly used in the act of Anne, as contradistinguished from the word *reprises*: For this word of itself would not have included the case of a mortgage, according to its legal definition; which in *Termes de la Ley* is thus described; "Reprises are deductions, payments and duties, that go yearly and are paid out of a manor; as rent-charge, rent seck, pensions, corodies, annuities, fees of stewards or bailiffs, and such like."—That there was some reason for this difference of expression, will further appear, from considering the stat. 10 Anne, ch. 23. This act which may be called

* In the establishment of a qualification for those who elect Registers for the several Ridings of Yorkshire, the election is confined to freeholders having 100l. a year. The expressions of the statutes concerning it are very different from those of stat. 18 Geo. II. ch. 18. The words are "freehold estate—of the yearly value of 100l." and in case of dispute, it is to be determined by the oath of the elector himself. See 2 & 3 Anne, ch. 4. 6 Anne, ch. 35. and 8 Geo. II. ch. 6.

Mortgage. contemporary with that of 9 Anne, prescribes
R. Strin- a freeholder's oath, in which the words are "free
ger. of all charges payable out of the same." Now, if the legislature had had the same intention in this matter as in the point of qualification of members, they would naturally have used the same words in a law made so near the time of passing the qualification act.

Another difficulty in this case arises from that provision of stat. 7 & 8 Will. III. ch. 25. by which mortgagors *in possession* are expressly empowered to vote for their estates. If therefore the annual value should be considered to be reduced by the mortgage interest, all those estates in which this reduction leaves less than 40 shillings, would be unrepresented; for the mortgagee, out of possession, cannot vote. It is hardly credible, if those who devised the law had conceived such an objection as the present to have existed, that they would not have taken notice of this effect of a mortgage, when expressly treating of its operation on the elector's right.

But it appears to have been the uniform opinion both of lawyers and members of parliament, from the earliest times, that the interest of a mortgage does not affect the vote. The Journals contain no trace of it (F.); and the present election is the first instance in which the objec-

objection was ever thought of. The reports of Mortgage. county elections in the Journals in different pe- ^{R. Strin-} riods, have been searched for this purpose. There ^{ger.} are three cases, which from the circumstances that occasioned the contests, and from the manner of conducting them, may be considered as leading examples; that of Essex in 1716, of Yorkshire in 1735, and of Oxfordshire in 1755. They were all most obstinately contested; and in the first and last of the three, the spirit of national party, then vehement, mixed with the dispute. The case of Yorkshire is still more in point, because in that county all transactions affecting lands are publicly registered; which practice was established long before the year 1735 *. Yet in none of these cases did it occur to any man to start the objection; although the most eminent men in Westminster-hall were employed in them as counsel. The same may likewise be said of the case of Gloucestershire, tried in 1777, by a select Committee; in which almost every question was raised, that ingenuity could devise.

This clear proof of the uniform judgment of mankind, by constant and uninterrupted usage, is such a confirmation of the foregoing

* By 2 & 3 Anne, ch. 4, 6 Anne, ch. 35, and 8 Geo. II. (in 1735, for the *North Riding*) ch. 6.

Mortgage. arguments, as ought in reason to determine the
 R. Strin- question.

ger.

The counsel for the petitioner, in support of their objection to the vote, argued in the following manner:

By tracing the principle and progress of the several statutes concerning county elections, it will appear, that all of them describe the right of voting, as belonging only to those who possess a *clear* rent of 40 shillings value issuing from their estates. The first statute ascertaining the qualification, (8 Hen. VI. ch. 7.) is very particular in limiting it to a rent or value *clear of all charges* *; and afterwards twice repeats the expression, *such as may expend 40 shillings by the year*; empowering the sheriff to examine the voters upon oath, as to this clear value. The next statute, 10 Hen. VI. ch. 2. limiting the qualification to the county, uses the same form of expression. This institution received no alteration till after the revolution; when by stat. 7 & 8 Will. III. ch. 25. a particular form of oath was prescribed for the freeholders. But this statute did not in the least add to the restriction; the legislature conceiving it to be clearly and thoroughly established. By 10 Anne, ch. 23. a new limitation was made, by requiring the free-

* *Outre les reprises*, in the original,

hold to be assessed to the public taxes; and a Mortgage. new form of oath was given, more strict and pre- R. Strin- cise than the former. This continued till 1745, ^{ger.} when the stat. 18 Geo. II. ch. 18. framed a new oath still more exact; upon the words of which the present question arises.

The cases cited on the other side to prove the nature of a mortgage, and that it is a personal debt, were decided upon disputes between heirs and executors; and, as *between them* or parties in their situations, there can be no doubt that mortgages are so considered. But when considered with respect to the *land* itself, they are always held to be a charge upon the land; and the mortgagee trusts to that alone, and has a right to insist upon that for the discharge of his debt, and to look no further. If there is no bond or covenant from the mortgagor to pay the money, the mortgagee cannot charge the personal estate but by the aid of a court of equity.

It has been contended on the other side, that the word *charge* in this act, is to receive a technical and limited construction; as if the antiquated payments of corodies and pensions, could have entered into the consideration of the legislators of the year 1745: When it is much more just and natural to understand the word in its general ordinary sense. The word *incumbrance*

Mortgage, has not a more extensive meaning than *charge* :

R. Strin-
ger.

No lawyer can think so ; and though the words of the qualification act are more numerous, they are not more significant than those in question. It might as well be contended, that a mortgage is no diminution of a member's qualification upon that act, as of the value of the freehold upon this.

The act in the sixth section declares, " That no public tax, county, church, or parish rate, or any other tax, rate, or assessment, upon any county or division, shall be deemed a *charge*, &c." It is plain, therefore, that without this exception, such taxes would have been so many deductions from the value of the land ; yet many of these taxes do not fall within the definition given on the other side, of a *charge* upon the estate. By this particular clause, the legislature seems to have intended, that *every* payment out of an estate, but those so excepted, should be considered as charges reducing the value ; and this is the most rational construction of the clause, according to the object of the law.

The case put of a person possessed of large personal property mortgaging his land, is not likely to happen ; but if it should, it would not alter the legal consequences ; for the right of voting is derived from the *real* property. A mortgagor, though keeping possession, is only
a tenant

a tenant at will to the mortgagee, who is, in Mortgage strictness of law, the owner of the land; and he R. Strin- may at any time obtain possession by an eject-^{ger.} ment, and compel the tenants to pay their rents to him. Surely no charge upon land can be heavier than one attended with such consequences. The stat. 7 & 8 Will. III. ch. 25. did not in the least intend to affect such cases as the present; nor can it without violence receive such a construction. The object of the section referred to, was to enable mortgagors, who had *in form* conveyed their estates to others, to exert a particular act of ownership, if at the same time they held possession of those estates; to relieve them from a legal disability, and to make, as it were, a new class of voters in counties, who were substantially the owners of the freehold, though deprived of it by legal form. But it cannot be supposed, that these voters were not to be subject to the same restrictions as other freeholders. The inference drawn from this statute, therefore, adds nothing to the argument for the sitting member.

What the true meaning is of the words "clear yearly value," may be learnt from a case lately decided in the King's Bench upon the Game act, which is in point to the present question; the case of *Wetherell* against *Hall* (G.) By stat. 22 & 23 Chas. II. ch. 25. the qualification for
killing

Mortgage. killing game is limited to those who possess lands
 R. Stringer. *of the clear yearly value* of 100l. a year. An
 action having been brought upon this act against
 Hall as unqualified, the defendant proved,
 that he was owner of an estate of the annual
 value of 103l. But on the other hand, the plain-
 tiff proved it to be reduced under the 100l. by
 a mortgage of lands producing 14l. yearly rent,
 for 400l. The defendant, the mortgagor, was
 in possession, and regularly paid the interest of
 the mortgage. A case was hereupon made for
 the opinion of the court upon the question, and
 was argued in Michaelmas term 1782, when
 the judges determined, (immediately, and with-
 out any difficulty) that by this mortgage, the
 annual value of the estate was reduced, and that
 it did not give the defendant such a qualifica-
 tion as the statute required *. When the words
 of the two statutes are compared together, it
 will be found, that those respecting an elector's
 qualification, are much more strict than those
 respecting the game; being, in the latter case,
 no more than "*clear yearly value*," which are
 much amplified in 18 Geo. II. ch. 18. So that
 the decision of the judges of the King's Bench,
 furnishes the strongest authority for deciding the

* Note (G.) contains a report of the arguments and de-
 cision in the case of Wetherell and Hall.

present question : They have expressly declared Mortgage
the law upon this subject.

R. Strin-

The case of a judgment has been argued to ger.
be equally a charge upon the land, yet that this
would not be contended for : But there is a great
difference between the two cases. A judgment
may, in its consequences, affect the land of the
defendant ; but a mortgage does absolutely. A
judgment does not affect any particular lands ;
but a mortgage is a specific *lien* upon lands par-
ticularly assigned. A judgment cannot affect
more than *half* of the defendant's land ; and his
personal estate is in the first place to be taken by
the sheriff, who ought not to attach the real, if
the personal estate is found sufficient. Further,
this part of the argument is founded on an ana-
logy to a case which never has been decided,
and perhaps never has happened.

Thus the main support of the argument on
the other side, is the circumstance of this ob-
jection's never having been urged before. Whe-
ther the fact be so or not, is uncertain ; for it
may have taken place in contests not now re-
membered ; and it would be too great a labour
to examine the reports of every county election
in the Journals, in order to ascertain it. But
taking it to be so, it may be well accounted for.
It can seldom happen, that a man lending mo-
ney on mortgage, will take a security so near
the

Mortgage. the value of the sum lent, as to give rise to the
R. Strin- objection; and still less frequently can such pri-
ger. vate transactions be known to those who would
 bring them forward. The peculiar circumstances
 of the contest in this county have given extra-
 ordinary activity to the two parties; and this
 added to its small extent, may account for the
 agitation of every point capable of arising.

It would not be weakening the present argu-
 ment, to suppose, that an opinion may have pre-
 vailed upon this subject, (as there did upon the
 game act before the case of Wetherell and Hall
 happened) that a mortgagee's interest did not
 constitute an objection. In a case similar to that
 of Wetherell and Hall, tried at the spring assizes
 at Thetford, in 1779 *, a very great judge
 (Blackstone) would not permit any evidence to
 be given of a mortgage, to reduce the defendant's
 qualification, giving a positive opinion, that it
 was not a case within the meaning of the sta-
 tutes; and the matter proceeded no further. But
 since the judges of the King's Bench have so-
 lemnly determined the point, can any thing be
 inferred from this instance of the mistaken opi-
 nion of one judge? Many mistaken notions of
 law have at different periods been current, and

* Mr. Graham, who cited this case, had been counsel in
 the cause at the assizes.

even lawyers have authorised them. Such no-Mortgage
 tions, however, are never to be revived, after ^{R. Strin-}
 they have been once corrected. ^{ger.}

The counsel for the sitting member observed in reply,

That the foundation of their argument, viz. *that a mortgage was a general personal debt*, had not been weakened by the observations in answer to it; and the several legal consequences of that position, had not been contradicted.

That as the counsel for the petitioner derived their whole strength from the case of Wetherell and Hall, it would be necessary to examine into the particular circumstances of that case, from whence it would appear that it did not deserve such implicit respect, as had been paid to it on the other side. The case was not very solemnly argued at the bar, nor much discussed by the judges; but taken up hastily. Then it was not brought forward upon a special verdict, or by motion in arrest of judgment; so that no writ of error could be brought, in order to obtain the opinion of all the judges upon the question; for as the opinion was somewhat unexpected in Westminster hall, and a contrary opinion was known to have prevailed before, it is probable that this decision of the King's Bench might have been set aside upon more mature deliberation among the 12 judges. In the course of the

Mortgage argument of this question, it was mentioned by
R. Stringer. the counsel as a well known case, put by way of
 illustration, *that a mortgage would not affect a*
freeholder's qualification; upon which Lord Mans-
 field, taking it for granted, observed, " but a
 voter *swears* to his qualification."

If we compare the progress of the different laws which restrain the qualification for killing game, with those respecting the votes in county elections, they will appear to have proceeded upon a principle directly contrary to each other. The acts for preserving the game, have always had in view some additional restraint, and have required an increase of the qualification. But the election acts have, in fact, always extended the right of voting, and made the real qualification of a county freeholder more general, as often as they have preserved the nominal limitation of 40s. value; for the continual decrease of the value of money has constantly had this effect. The period intervening from the reign of Henry VI. to that of Will. III. had made a prodigious change in the state of the electing freeholders, by the operation of this cause. This change was acceded to by the stat. 7 and 8 Will. III. and when the act of 18 Geo. II. passed, the same cause had again operated in the same manner, in the course of the 50 years elapsed since the act of Will. III.

This consideration ought to have great weight Mortgage in deciding the present question; because it ^{R. Strin-} shews that no decision upon the game acts canger. be in point to this subject; howsoever the words of the two laws may resemble each other. No evidence has been offered here, that the voter has not personal estate sufficient to pay the interest of the mortgage; and it is to be presumed that he has, till the contrary be proved. If he has sufficient, the land is thereby cleared of the charge.

Although great stress is laid by the counsel for the petitioner, upon the expression *clear yearly value*, yet it has been shewn that these words must relate to such charges as the law acknowledges to be peculiar to the land. The perplexing consequences of any other construction have been already adverted to; to which it may be added, that the value of every acre of the estate, ought, in justice, to be measured by a more certain criterion, than the rent paid. Surveyors and farmers should be examined; and the utmost amount of the value should be known, before an elector should be deprived of his franchise by such an unfavourable objection.

The Committee resolved,

That the interest upon a mortgage, the mortgagor still being in possession, is such a charge upon the

Mortgage estate *within the meaning of the statutes, as to*
 R. Strin- *affect the rights of the voter* *.
 ger.

And likewise,

That the counsel be permitted to call evidence, to shew that the interest upon a mortgage reduces the clear yearly value of an estate below 40s.

A few days after this decision was made, when the counsel for the sitting member began to enter upon their case in the same hundred, they said, They conceived themselves enabled, by the words of the above resolutions, to offer evidence of the voter's ability to pay the interest of the mortgage from his personal estate; so as to leave him a clear annual income of 40s. from the estate for which he voted, after paying the above interest. Upon this the chairman interrupted them, by saying, That the Committee

* Since this resolution passed, the legislature has made a declaration of the law upon the subject, in stat. 28 Geo. III. ch. 36, f. 6 and 9. The regulations therein prescribed require the estate to be *of the clear yearly value of 40s. over and above the interest of any money secured by mortgage upon it, and also over and above all rents and outgoings payable out of, &c. other than the public taxes.* Yet considering the doubt and contradiction in which the point had been involved, by the opinions of individuals and the decisions in the election courts, the clause has not that form and solemnity which might have been expected (from former instances) in a declaratory law, made upon a difficult legal question. The subject is introduced indirectly into the act, and as if the law were taken for granted.

had

had considered the question in this point of view, ^{Mortgage} before they formed their opinion above men-
 tioned. Another member said, They had con-^{R. Strin-}ger.

sidered the mortgage as a specific charge on the real estate itself, according to the decision in the case of Wetherell and Hall. Some members then proposing to withdraw*, to consider whether they should add any thing to their former resolution, the Committee withdrew; and soon after returned, when the chairman told the counsel, That the Committee had passed the following resolution in addition to the two former, viz.

That the interest of a mortgage, (which is charged upon the estate in right of which a voter voted) being established by evidence, so as to reduce the value of the estate to less than 40s. per annum, does invalidate the vote; and that such evidence is conclusive, notwithstanding any other property possessed by the voter.

In the course of the evidence upon the estate upon which the above question arose, (which consisted of a house divided into two tenements, and 11 acres of land) the annual value was proved, on the part of the petitioner, to be about 9 or £.10 exclusive of taxes; the annual interest of the mortgage money was £.8 16s. But in support of the vote, it was made a ques-

* At this time they sat in the Court of Chancery.

Mortgage tion, Whether £.70 part of the principal sum;
R. Stringer. was a legal charge on the estate; Besides which, evidence was given of the value being equal to £.13 a year; which rendered the other question unnecessary. The estate had not been let; and the method of establishing the value, was by examining persons of the neighbourhood, farmers or others who were acquainted with the lands; and by inquiring into the amount and proportion of the public and parish taxes with which they were charged. The same method was followed in the other cases in which an objection was made to the value. Where lands were let, the rent was in general considered only as one mode of estimating the value, but not sufficient to exclude other means of information *.

In conclusion, the Committee held Richard Stringer's vote to be good; upon the evidence of the intrinsic value of his estate.

Cricklade [In the Cricklade Committee, the objection of
Mortgage a mortgage, and that of an estate subject by will to the payment of debts and legacies, reducing the value in the same manner, were argued upon at the same time, and received both together the judgment of the court: It was contrary to that of Bedfordshire, in the following words:

* See the resolution in p. 450.

† That the mortgagor in possession* of lands of Cricklade the value of 40s. a year; and the devisee in possession of lands of the value of 40s. a year, devised subject to the payment of debts and legacies, are intitled to vote †.

In the case of Buckinghamshire, this question was raised and argued on the second day of the trial. The circumstances of it were exactly the same as those of Richard Stringer. The Committee resolved,

That a mortgage is such a charge on land, as may reduce the value of the freehold below what may intitle a person to give his vote for a knight of the shire.

The first, in point of time, of the above three decisions, was that which passed in the Bedfordshire Committee. The Cricklade case next, and within a few days after it; and that in Buckinghamshire last.]

THE COMMITTEE declared their opinion of Value reduced by Taxes. the effect of taxes on the value of an estate, upon a case that arose within a few days after their proceedings began.

The stat. 18 Geo. II. ch. 18, s. 6, provides, That no public or parliamentary tax, county,

* In all the three cases the mortgagor was in possession.

† See note (F.)

H h 4

church,

Value re- church, or parish rate, or duty, or any other tax,
duced by rate or assessment whatsoever, to be assessed or
Taxes.

levied upon any county, division, &c. is or shall be deemed, or construed to be any *charge* payable out of, or in respect of, any freehold estate, within the meaning and intention of this act, or of the solemn oath or affirmation, &c. The words of the same act thus referred to are, "clear yearly value of 40s. over and above all rents and charges payable out of, &c."

It was debated how far this exemption should be carried. The voter, in whose case the question arose, occupied his own freehold; which, without adding to the annual value the amount of taxes charged upon it, was worth less than 40s: The addition of the sum paid for taxes raised it to more. The party objecting to the voter contended, That this freehold gave no right of voting. They argued thus:

Although where an estate is let for 40s. a year, taxes are not to make a reduction of the value, for the purpose of voting, yet the expressions of the statute do not import that such deductions should be considered as *a part* of the value: This would be a great inconsistency. In the same manner a man's debts might be considered as part of his property: Such a position was never made before. The just way of con-

sidering

considering this matter is, to take an estate before ^{Value re-} the land tax was imposed. Suppose it let for ^{duced by} 36s. a land tax of 3s. in the pound would ^{Taxes.} *raise* the value to 40s. if, in the sense of the law, *not deducted* means *added*; and thus he who had no vote before, would find himself qualified by the charge; which would be absurd: For, in truth, the estate was reduced to so much less; and, as it has turned out in fact, so much property as the tax amounted to, has been ever since lost to the owner. Then can it with any propriety be said, that taxes are part of the *produce* of an estate? The charge is not to deprive a man of a vote, who at the time when it was first imposed, possessed 40s. a year. This is the extent of the act: That the right of voting may not be infringed by the diminution. The clause in question merely makes an exception of certain cases, and is not declaratory of a right. But the sense which the other party would put upon it, would carry it by construction much further than its spirit or letter will bear.

The argument on the other side was to the following effect:

There is no real difference in the distinction now made; for if it is admitted that the owner of 40s. a year preserves his vote, when part of it is paid away for taxes, whereby the produce is so far reduced to him, it must follow that in
the

Value re-
duced by
Taxes.

the other case the taxes must be included in like manner; since in the first case the value cannot be made out without reckoning them, as in the other. All the difference lies in the manner of doing it, from whence the fallacy of their argument arises. For, suppose an estate of 40 s. value, from which 8 s. are paid for taxes, occupied by the owner: They admit the value continues the same. Suppose the owner lets it for 32 s. and pays the taxes himself, is not the worth to the owner the same? Where the tenant pays the tax, the landlord receives the clear rent; where the latter pays it, he receives a gross rent; but the real produce to him is the same in both cases. The only difference consists in the hand that pays the outgoings; and the addition and reduction of the tax are convertible terms, according to the nature of the case. In substance and effect the landlord ultimately pays the charges upon every estate.

But an ingenious difficulty has been raised in the way of this argument, by putting the case of a vote *created* by payment of taxes, which would be insufficient without them. The solution of it is easy: If a tax is laid on the land, it must necessarily be such as the property can bear; this follows from the nature of taxation. In the case supposed, the value of the estate is mistaken by its owner, and ought to be rated higher;

higher; for by as much more as the owner paid Value re-
 when the tax came, was the rent too low before. ^{duced by}
 Taxes. }
 If it is capable this year of paying the additional
 charge, it was equally capable in the year pre-
 ceding of paying so much more in rent. Land
 let on such terms might have been set higher;
 and a landlord would take advantage of that
 circumstance, if a tax should cease, to raise his
 rent in proportion to the discharge of the tax.
 It was the object of the law to prevent a dis-
 qualification by contributing to the public bur-
 thens; and if the construction of it should be
 thought doubtful, that course should be taken
 which will best promote this end.

While the counsel were arguing this question,
 they were asked by the court, if they put the
 poor rates upon the same footing with the public
 revenue taxes; to which it was said in answer,
 that both were considered to be the same in this
 respect.

The resolutions of the Committee were com-
 municated to the parties in the following words,
 viz. A motion having been therein made,

*That the parochial taxes, when paid by the tenant,
 constitute a part of the rent paid by him for the
 land, and are to be considered as part of the income,
 in right of which the owner votes,*

It passed in the negative.

[This

Value re-
duced by
Taxes.

[This question was resumed again by the Committee some time afterwards, during the trial of votes in the hundred of Manshead, and a similar resolution then passed upon this re-consideration of it.]

A motion, *That the land tax, when paid by the tenant, constitutes, &c.* (as in the former)

Passed in the *affirmative*,

A similar motion respecting the *window and house taxes*.

Passed in the *negative*.

III. CASES upon the ASSESSMENT ACT,

20 Geo. III. ch. 17.

Assessment

When the first objection was opened to a vote upon the construction of this statute for regulating the assessments to the land tax, a proposal was made by the Committee to the counsel, to agree upon a precise state of such questions as they intended to agitate upon it, and to argue them altogether. Accordingly, upon a subsequent day this was done.

The first section of this statute enacts as follows, (reciting the difficulty of ascertaining the rights of voters, and the disputes thereby occasioned

tioned at elections in counties, as the law then ^{Assessment} stood.) That from and after the 1st of January 1781, no person shall vote for electing of any knight or knights of the shire to serve in parliament within England or Wales, in respect of any messuages, lands or tenements, which have not for six calendar months next before such election, been charged or assessed towards some aid granted or to be granted to his majesty, his heirs or successors, by a land tax, *in the name of the person or persons who shall claim to vote at such election, for or in respect of any such messuages, lands, or tenements, or in the name of his or their tenant or tenants, actually occupying the same, as tenant or tenants of the owner or landlord thereof.*

The second section provides an exception for annuities and fee-farm rents, (duly registered) issuing out of any messuages, &c. assessed as aforesaid; and also for persons who may become intitled by descent, marriage, marriage settlement, devise, or promotion to any benefice in a church, or to an office within 12 months before the election, if the messuages, &c. for which the vote is given, *have been within two years next before the election rated or assessed to the land tax, in the name of the person through whom the voter derives his title; or in the name of some predecessor, within two years next before the election, of a person voting in respect of a benefice, or an office; or in the name*
of

Assessment of the tenant of such person, such tenant actually occupying such messuages, &c.

The third section directs the commissioners of the land tax to deliver to the assessors a printed form of an assessment, as set forth in a schedule annexed to the act; and the assessors are required to make their assessments according to the said form, and to cause a copy to be stuck upon the church door. And if the name of any *owner* of any messuages, &c. intitled to vote shall be omitted, he may appeal to the commissioners of the land tax, who upon sufficient cause shall amend the assessment, by inserting the name of the actual occupier, and of the owner or person intitled to or in receipt of the rents; or erase the name of any person improperly inserted. These are the three principal clauses of the act; for the rest, as well as for the express words of these, I refer the reader to such parts of the act itself, as are copied in note (H.) subjoined to this case. The following is the

FORM

FORM of ASSESSMENT to which the ACT refers. Assessment

County of N. to } An assessment made in pursuance of an
 wit: For the pa- } act of parliament, passed in the year
 rish of — in } of his majesty's reign, for granting an aid
 the said county. } to his majesty by a land tax, to be raised
 } in Great Britain, for the service of the
 } year one thousand seven hundred and

Names of Proprietors.	Names of Occupiers.	Sums assessed.
A. B. —	Himself. —	— — —
A. B. —	C. D. —	— — —
E. F. —	C. D. —	— — —
C. D. —	G. H. —	— — —
I. K. } and L. M. }	N. O. —	— — —
P. Q. —	{ R. S. } and { T. U. }	— — —

Signed this day of

17 by us,

A. B. }
C. D. } Assessors.

The questions proposed to be argued were these:

1. Whether the form of the schedule must be strictly complied with.
2. Whether the name of the person claiming to vote must not appear upon the assessment either as owner, in the proper column, or as landlord to the particular tenant mentioned, in the column of tenants.

3. Whe-

Assessment 3. Whether, where the name of another owner appears upon the assessment, it is competent to the voter to prove that the tenant assessed is his tenant.

The counsel for the petitioner contended, That the form of the schedule need not be strictly complied with; that it was not necessary that the voter's name should appear upon the assessment; and that in the latter case it was competent to the voter to prove the fact. They argued thus:

Whatever might have been the original design of those who planned this statute, the effect of it is now to depend upon the terms in which it is expressed. Those relating to the point in question are in the disjunctive, viz. "in the name of the person claiming to vote, *or* in the name of his tenant." Now though there are many cases in the law, as in the construction of wills or deeds, in which the word *or* is made to signify *and*, and has a copulative sense given it, because the meaning of parties cannot otherwise be effectuated; yet that method of construction, and the reason of it, are never applied to acts of parliament, which are deliberately and solemnly made, and to which mistakes cannot be imputed: Besides, the clause before us has a clear and known sense as it stands. Therefore by this regulation of the statute, it plainly is sufficient

ficient that either the name of the landlord, or *Assessment* of the tenant, is in the assessment. The form of the printed schedule, no doubt, gives both names; but this form, though prescribed by the law, is not essentially necessary to the rate. The words of the two different parts of the act are essentially different. The first section is positive, "No man shall vote, &c." This is absolute: But in the third section, "the assessors are *required*" to assess in a particular form. There is a known distinction between such provisions of the statutes as are directory only, and such as are conclusory. The assessors ought to follow the form prescribed, and are punishable for their disobeying the requisition. But their neglect of duty is not to annihilate the elector's franchise. There is no sentence in the statute from which such conclusion can be drawn. It is in this point only *directory* to the assessors, not *conclusory* upon the voters. In the same manner as in the case of the King and Sparrow, 2 Stra. 1123, which arose upon an appointment of overseers of the poor, made after the time directed by law, the court confirmed the appointment, though they held the justices culpable in not making it sooner. The stat. 43 Eliz. directs the appointment to be in Easter week, or within a month after Easter: Yet in the above case, the appointment there held valid was not made till six weeks after.

Assessment

Sir Edward Coke has given authority to the distinction between *directory* and *conclusory* laws, which seems to have guided the judges in the above case *. According to him, the *direction* of a statute is *matter of order, which maketh nothing void*: An opinion very applicable to the directions of the statute in question.

So in a question upon the statute 43 Eliz. which requires that parish apprentices shall be bound before justices *dwelling in or near the place*: An objection having been made to the binding for the want of this qualification in the justices, the court overruled the objection, saying, that the statute was in this respect only *directory*. Comb. 289, cited in Bott 142. The allowance of a poor's rate was objected to for the same reason, and received the same answer. Vin. Abr. tit. *Poor*, 425. And in another case, upon that clause of the stat. 5 Eliz. which requires the binding to be till the apprentice's age of 24, otherwise to be void *to all intents*, the judges in the same manner considered this clause to be only *directory*; and that a settlement was lawfully gained under such apprenticeship. Bott 145.

The cases cited are full illustrations of the point contended for. But further, if this form is necessarily to be followed, and nothing else will do, then all the provisions respecting it are

* In the debate upon stat. 1 Hen. V. & VIII. & 23 Hen. VI. requiring residence. See 1 Journ. 516, 7.

equally

equally essential to the right of voting. If the ^{Assessment} order of the columns in the schedule should be inverted, if the proper duplicates should not be made, if they should not be stuck upon the church door, in either case, by this rule, the assessment is bad : Which is too absurd to be contended for.

It is said, the intention of the framers of this bill, was to give to an assessment the effect of an exact register of county voters. Perhaps it was so ; but they were not able to carry it into execution. And the question before the court, arises upon the intention of the legislature, as expressed in the law itself ; and not upon the wishes of those who proposed it. Many alterations were made to the bill, in its progress through the house ; and, among others, that material one which placed the word *or* in the room of *and* (as it first stood) in that sentence upon which the argument arises. This shews, that the legislature was aware of the difficulties of that mode of assessment which the sitting member contends for, and studiously provided a different one.

Another objection to the necessity of this form of assessment is, that the assessors would thereby have it in their power to exclude whom they pleased from voting. Perhaps it may be argued in answer to this, that parties are impowered to appeal against the assessment, if they have any cause. But this appeal is given to the *landlord*

Assessment only, upon the omission of *his* name, and not to the tenant; the omission of whose name is not made the foundation of an appeal.

These observations are applicable to all the three propositions; for if either landlord or tenant may be rated, it follows, that the assessment may be in a different form; that the voter's name need not be there, if his tenant's is; and that he may prove the person rated to be his tenant.

The only words of the act, from whence any ambiguity can arise upon this subject, are those at the end of the first clause, "actually occupying the same, as tenant or tenants of the owner or landlord thereof," from whence it will be inferred, perhaps, that the tenant is to be assessed *as tenant to the particular landlord*. This is even more than the schedule requires; and such a sense cannot be derived from the clause, but by construing the words out of their grammatical order. Relative words must be carried to the next antecedent, by which rule the sentence "as tenant &c." refers to "actually occupying the same." An obvious reason offers for inserting those words here. It might have been for the purpose of excluding mesne tenants, and cases of disputed rights. The law means, that the tenant named, shall be he who actually occupies the freehold.

The

T
plain
fion,
first
with
" or
perfo
such
W
certa
shoul
If A
as lar
well a
vent
his vo
votes
name
Bel
body
tended
siderin
move.
versant
cases in
beginn
ness of
* See

The second section makes this construction ^{Assessment} plain. It excepts the cases of descent or succession, and promotion, from the regulations of the first section, if the tenements have been rated within two years in the name of the predecessor, "*or in the name of the tenant or tenants of such person, such tenant or tenants actually occupying such messuages, &c.*"

With respect to the third question, the act certainly could not mean, that the assessment should be *conclusive* evidence of the right to vote. If A.'s estate is occupied by B, and C. is named as landlord instead of A. it would be unjust as well as contrary to the object of the act, to prevent A. from shewing this mistake in support of his vote: Because *his* tenant is assessed, and he votes in respect of land paying the tax, in the name of such tenant.

Besides these particular arguments upon the body of the act itself, the construction now contended for will receive additional force from considering what difficulties it was intended to remove. It is well known to those who are conversant in the business of parliament, that some cases in the Gloucestershire election, tried in the beginning of 1777 *, first suggested the usefulness of new regulations of the land-tax assess-

* See P. 47—55 of the resolves of that Committee.

Assessment ments. It appeared to that Committee, that the owners of many estates paid no land tax directly. Small estates, carved out of larger, had been purchased free from land-tax; i. e. the owner of the principal estate paid the tax for the whole after its dismemberment, and was rated for it. In the course of a few years, it often became difficult for the owner of the parcel, to prove that his land was assessed or paid for. This was one of the evils which this act intended to remedy; which end will be sufficiently answered, if the assessment contains the name either of the landlord or of the tenant; for in either case it shews, that the particular estate bears the charge.

If in such a case the Committee should entertain doubts upon the question, they should consider this general principle, that where a law infringes upon a general right, it ought to be construed most favourably to the right, and so as to enlarge rather than restrain it.

The counsel for the sitting member contended for the affirmative of the two first questions, and the negative of the third, in the following manner.

There are certain rules of construction invariably observed by the judges in the exposition of statutes; which being established by their authority, ought to be followed by the Committee in considering the statute before them.

Accord-

According to these rules, it is necessary to ^{Assessment} consider how the law stood at the passing of an act, what evils it proposed to remedy, and in what manner to carry its provisions into effect. For this purpose, that construction is to be followed, which will best advance the remedy, and suppress the evil *. If any clauses are seemingly inconsistent, the general scope and design of the act is to be the means of reconciling them: And if any are dubious, the consequences as to public or private inconvenience are to be attended to; so as to give effect, if possible, to every particular clause, but in subservience to the whole.

The preamble of this statute declares, that the laws ascertaining the rights of election in counties, are difficult to be carried into execution, from whence numberless disputes have arisen. The remedy proposed for these difficulties, is to substitute a clear written instrument of authority, to ascertain these rights, instead of the uncertain parole testimony by which most of the disputes were before occasioned; and to prevent the necessity of recurring to extrinsic evidence of the fact. The only method therefore to effectuate this intention of the act, is to require the assessment to be made in that form, which will best serve for an explicit register of voters.

* See 1 Black. Comm. p. 187. and the places there cited.

Assessment Before this act, the stat. 18 Geo. II. ch. 18. regulated the assessment of freeholds. It enacts, in sect. 3. That after 24 June 1745, no person shall vote for a county, "in respect or in right of any messuages lands or tenements, which have not been charged or assessed towards a land-tax, 12 calendar months next before such election." Such assessment must necessarily have been in the name of the owner *or* occupier—it could be no other. This method was open to those difficulties which the present act complains of: For it was so construed, that if any implied assessment was made, that was held sufficient; and therefore the last act prescribes a new method. But if the construction contended for by the petitioner prevails, it will pervert its design, and render its provisions nugatory. For the new mode of assessment will contain no more particulars, and give no further information than the old one. Thus all the pains taken by the legislature will be fruitless, and a solemn law, framed after long consideration, eluded.

Not only the title and preamble of the act, shew its object to have been as above stated; but the subsidiary regulations, upon which many sections of it are employed, are all directed to the same end; and can answer no purpose whatever, unless such be its object. Thus it directs duplicates to be made with great care, and preserved

served so as to be at all times ready for inspection, and to furnish legal evidence; for which purpose, the clerk of the peace has several duties enjoined him, and among others, that of being in waiting at elections, and upon several days previous to them *; and a heavy penalty is inflicted upon his neglect of these duties. But if the other argument succeeds, his office is in this respect useless, and his attendance with the duplicates an idle ceremony.

Precaution is also taken for preserving the regularity of the assessment, by enabling the freeholder to appeal if his name is omitted. It is said on the other side, that the giving this appeal to the *landlord* only, and not to the tenant, proves it to be unnecessary to rate both. But the inference is not just; for the owner is the only person interested, and therefore the only one who could with any propriety appeal †. Upon such appeal the Commissioners would be bound to comply with the form prescribed, and to insert both names, in all cases where the land was let. It is plain the act intended to have both names inserted in the rate in *all* cases, by directing the owner's name to be repeated in the column of occupiers, when he occupies his land himself.

* Sect. 16.

† See sect. 10, "any person aggrieved" may appeal.

Assessment The counsel for the petitioner, for their chief support, rely upon a forced distinction that was formerly made between directory and conclusory laws. It is to be lamented that such a method was ever taken for repealing a statute; for it cannot be denied, that this distinction has the effect of a *repeal*. It is not very honourable to the expounders of our laws, to have given way to such trifling subterfuges. Laws do not speak in the language of recommendation, but of command; and all their injunctions are to be obeyed alike. It is probable, however, that this notion was not in its origin a judicial one, but political; though Sir Edward Coke himself was the first who countenanced it *. Yet this was not

* I have met with a different account of the origin and disuse of the statutes, upon which Coke employed this distinction, given by Harley Earl of Oxford when Speaker. In the opening of the debate on the Aylesbury case (Ashby and White) in the House of Commons, he gave the house an account of the election laws; in which, speaking of the abovementioned laws of residence, he says, "Some of the law books give a *pretty construction* of it, *that though there was such law, yet the custom of parliament was to be the rule*: But it seems a better construction, that it being then reckoned a service, and a hard service, none but residents in the borough were *compellable* —." See his speech in 8 State Tri. 92. from whence I cite it. The *pretty construction* he alludes to, is probably that of Chief Justice Pemberton, in the Halletmere case of Onslow and Rapley, tried in 1681, and cited in 1 Doug. elect. 342; in which the court would not enforce those antient statutes requiring residence, for that reason.

done

done on the seat of justice, but in the House of ^{Assessment} Commons; at a time when he was a leader of the national party there, and upon a point in which that party made head against the court. Therefore though the distinction may have been observed, on account of the weight of his opinion, it appears not to be intitled to the authority of a legal principle. It is remarkable too, that the very statute which was then the subject of debate, and of this doctrine, and was then evaded by it, has been thought so valid by the legislature itself in modern times, that a statute was made expressly to repeal it *. A striking proof this, of the little respect the doctrine is intitled to. But admitting it, for argument's sake, it is not in point to the present question. Where great public inconvenience is likely to follow from the strict execution of a law, it has been palliated by this mode of construction; and no case has extended it further. But here the petitioner's argument would introduce the distinction, in order to produce great public inconvenience; not in order to silence an obsolete

* See stat. 14 Geo. III. ch. 58. In the year 1571, according to 1 Journ. 84, 85, a bill was introduced in the House of Commons, which seems to have had the same object as the above statute. It appears to have been twice read, after which I can find nothing further relating to it.

law,

Assessment law, (as was Sir E. Coke's case) but to annul the effect of a law newly made.

The cases cited on this point shew, that where the courts have made use of the distinction, it has been on this principle, and in order to execute a statute according to its true spirit. Thus in the case of the King and Sparrow, the court held that the chief end of the act in the appointment of overseers, being for the benefit of poor, the regularity of their appointment according to the method prescribed, was not so much to be attended to, as the *end* and *use* of it; and therefore supported the officers who had not been legally made in point of form, in order to this end. So in the case of justices allowing a rate, which is for the benefit of the poor, and the act of allowance merely formal, the courts, for public convenience, would not set aside a rate, to which there was no other objection than that the justices were not described as dwelling *in or near the place*.

In the apprentice's case, under stat. 5 Eliz. the question was not upon the validity of the indenture made contrary to the act; but upon a collateral right derived under it, namely, whether such a service was not sufficient to gain a settlement; as to which point the legal forms of the binding were indifferent; and the judges, liberally considering that the apprentice himself could

could not have prevented the defect, would not ^{Assessment} suffer *him* to be affected by it. The obligation of binding till the age of 24, is considered to be provided by the act, for *the benefit of the master*; and therefore though he declines it, still the binding has been held legal as to other purposes. In these cases, it is not so much to the law, as to the tendency of the question raised upon it, that the judges have applied the phrases mentioned. The case under stat. 43 Eliz. was an indictment for refusing an apprentice; and the court would not countenance a refusal supported by such an evasion of the law, as the defendant employed: For his conduct could not have been affected by the place of residence of the justices.

If in the construction of formal settlements that are drawn with the greatest care, and often from approved precedents, the meaning of words has been directly changed, in order to effectuate the meaning of the parties, there can be no reason why the same construction should not prevail, to give effect to the design of a public law, where the public at large are the parties concerned. *A fortiori* in cases of this sort it would be just to construe *or* to mean *and*, in a law which would fail in its principal object without such a construction. For it is clear, that the whole argument of the petitioner, is founded on
the

Assessment the strength of the word *or* in the first section:
 { The other clauses are far more consistent with it in the sense of *and*, than in its own ordinary sense.

The words "actually occupying the same," are said to be relative to the next antecedent; but it is as grammatical and proper to understand them not to be relative words, but a parenthesis. In this case the clause should be understood to require an assessment of the tenant *eo nomine* as tenant. There is a good reason in law for requiring the tenant to be named in the rate; because the tax is laid on the land, and to be received there. As between landlord and tenant it is considered as a tax on the owner; but as to the public revenue, it is a tax on the occupier. This was lately the doctrine delivered in the court of King's Bench in a case before them*.

It has been urged on the other side, that the statute infringes on the common law right, and therefore is to be taken more favourably for the right. But this argument supposes a right of voting to be a pecuniary property; whereas it is a public trust, which individuals exercise for the public benefit. The supposed hardship on the voter, in being restrained in the exercise of

* The case of the King and the inhabitants of Mitcham, in Easter Term 1783. Cald. 282.

his franchise, if the fact were so, can furnish no ^{Assessment} argument against the true construction of a public act, because it would be no *public* inconvenience. But the regulation proposed puts no restraint upon any but those who neglect their own interests, by not observing the course marked out by the act. *Lex vigilantibus non dormientibus subvenit.* Public notice of the rate is directed to be given; and if a freeholder indolently suffers his name to be omitted from it, he has no right to complain afterwards. Such a mode of argument might be used with more justice in support of those voters in scot and lot boroughs, whose names are not in the poor rate; because the right derived from those rates depends on a statute, made without the least design to affect the right of voting. Yet it has been long established, that a man who lets go by his time of appealing against those rates, shall forfeit the privilege resulting from them. Now the statute in question was made expressly to regulate the rights of election, and the appeal is one of its most effectual provisions for this purpose. Here is therefore much stronger reason for enforcing the legal consequences attached to that regulation, than in the other case.

If the assessment is not made according to the form prescribed, it ought not to be considered as legal evidence of the rating; for it is not

Assessment the legal instrument required. The form of the rate is an essential part of the law, and must be literally complied with. In the same manner as the indictment at the sheriffs turn, prescribed by the statute of Westminster; which if not adhered to, would be quashed, according to the authority of 2 Inst. 387. So a bill of exceptions would be bad, if not under seal, because that is the form prescribed by the statute.

If the court should construe the present act, so as to allow a different mode of rating, there can be no subject of grievance to be remedied by the appeal which is so particularly described in sect. 3, 10, and 11. For if a man is not prevented from voting by a different form of assessment, he has nothing to complain of.

The foregoing arguments tend to shew, that the construction contended for by the petitioner, will be an evasion of the act; and that the way to prevent this, is to adhere to the form of assessment annexed to it. But if the Committee should think this not essentially necessary, the next precaution required, is that of inserting in it the freeholder's name at least; because, without that, the rate cannot produce the good which the act intended.

This gives an answer to the first and second questions proposed. The answer to the third is a corollary from the other two: For if when
the

the
me
own
ceiv
writ
mak
fact,
T
abov
tions
ift
sched
2d
assessm
of the
Th
their
arrang
above
Wr
occup
two: 1
That
* Th
different
with tha
at the en

the right owner's name is not inserted, the assess- ^{Assessment} ment is bad, it must be equally so if a wrong owner's is inserted. If parol evidence is received to prove the assessment of a freehold, the written assessment, which the act intended to make conclusive and the only evidence of the fact, becomes useless.

The Committee, after deliberating on the above arguments, came to the following resolutions, viz.

1st. *That it is not necessary that the form of the schedule should be strictly complied with.*

2d. *That the owner's name must appear on the assessment, either as the person assessed, or as owner of the land for which the tenant is assessed*.*

The following cases are classed as nearly as their subjects will admit to the first general arrangement of them †, in order to explain the above construction of the law.

Wm. Gale voted for *land in Goldington* in the ^{Wm. Gale} occupation of Mrs. Smith. The objections were ^{School-} two: 1. That he was not duly assessed; and 2. ^{master.} That he had no such freehold as he described at

* The Buckinghamshire Committee construed this law differently. The reader will find their resolution, together with that of Cricklade, with which it accords, subjoined at the end of this third section of cases.

† See it in p. 400.

Assessment the poll. The voter was the schoolmaster of a
 Wm. Gale free school at Thurleigh, appointed by the vicar,
 who also had the appointment of six boys to be
 taught by the master. Under this appointment
 he received 40s. a year, issuing out of lands in
 Goldington, that were charged with the payment
 of it, *for the benefit of the school of Thurleigh*,
 (which were the words of the foundation deed.)
 His right to vote depended on this appointment.
 These lands belonged to Mrs. Edwards, and
 were occupied by Mrs. Smith, as tenant to her;
 and she annually paid the 40s. to the voter. The
 entry in the assessment which was relied upon
 for the support of the vote, was that of Mrs.
 Edwards's estate, in the words "*Mr. Edwards*,
 (landlord) *Mrs. Smith* (tenant)." Mr. Edwards
 being in the management of his mother's estate,
 his name was entered upon the assessment by
 mistake for hers.

There was a dispute as to the manner in which
 the voter described his freehold at the poll. He
 came there on the side of the petitioner; and
 the circumstances of his claim occasioned some
 altercation in the election booth, between the
 counsel. Lord Ongley's counsel requiring that
 his vote should be entered for the house he lived
 in, and not in right of his salary, because it was
 not registered according to the stat. 3 Geo. III.

ch. 24

ch. 24. The witness who related this, heard Assessment
Gale give in his vote, *for his salary out of meadow* ^{Wm. Gale}
land in Goldington, with the name of the tenant.

The counsel for Lord Ongley, in objecting to this vote, now contended, That it was bad every way: That if he had an annuity out of this estate in right of his place, it ought to be registered according to stat. 3 Geo. III. ch. 24. That if his freehold consisted of *land*, it ought to be assessed to the land tax; and that if it was that sort of annuity not required to be registered, it was equally necessary that it should be assessed to the land tax.

The counsel for the petitioner relied upon the evidence of what passed at the poll, from whence they argued, That it was improperly entered as it stands, by the mistake of the poll clerk; who ought to have taken it down as the voter described it, *for his salary*. And they argued, That the above stat. 3 Geo. III. ch. 24*, did not

* This act provides, that after the 1st of August, 1764, no person shall vote for any annuity or rentcharge, issuing out of freehold lands or tenements, and granted before the 1st of June, 1763, unless a certificate upon oath be entered with the clerk of the peace, in a form therein prescribed. The conclusion of this form is in these words: "And I, or the person or persons *under whom I claim*, was or were seized of the said annuity or rentcharge, before the 1st of June, 1763." The second section provides for the cases of

Assessment not require annuities annexed to offices to be registered. That the case of an annuity paid to a clergyman in lieu of tythe, was of the same sort with this, which the Gloucestershire Committee, in 1777, had allowed to be good under a similar assessment to this, in the case of the Rev. Richard Jones*. That as to the objection

descent, &c. or promotion to an office, within 12 months before the election. The third section directs the manner of entering memorials of the annuities granted after the 1st of June, 1763, viz. 12 months before the election, and *under the hand and seal of the grantor or grantors*, with the date, names, additions and abodes of the parties and witnesses. The fourth section directs certificates of the assignment of annuities, with equal strictness.

The above regulations do not seem to have been intended for cases of annuities annexed to offices; but chiefly for those which pass upon valuable consideration between parties. It is intitled, An act to prevent *fraudulent* and *occasional* votes ——— by virtue of an annuity or rent charge.

* The following is a copy of this case from p. 40, of the Resolves of that Committee.

“ Rev. John Jones. Objection, annuity not registered. The annuity for which he voted was a payment of £.20 a year, in lieu of tithes. It was contended, That this payment was not of the nature of those annuities which the act directs to be registered: That the registering act supposes annuities to be granted so secretly, as to facilitate the splitting of votes: That in the case of a salary, it was of a public nature, and could not be concealed.

“ It was answered, That if a salary was not under a necessity to be registered, every person enjoying an annuity

would

tion on the score of the rating, this was a ^{Assessment} case which formed a necessary exception to the ^{Wm. Gale} assessment act; because *Gale* could not obtain an insertion of his name in the rate, by any method therein provided; and was absolutely without remedy, if omitted by the assessors.

GOOD.

Thomas Gardener and Peter Mason voted ^{Thomas Gardener.} each for *land and tythe in the occupation* of Edward ^{School-} Rudd. They were schoolmasters; the former ^{master,} of the free school of Biggleswade, the latter of Holme, instituted by the will of Sir John Cotton in 1726; under which appointments they received annual salaries out of an estate settled by the will for those uses. The estate was assessed under the name of *Charity land*.

GOOD.

would evade the act by calling it a stipend: That if a man has an invisible interest, not corporeal, it is denominated an annuity or rentcharge: That this being of an incorporeal nature, could not be found out without being registered, which was one of the principal purposes of the act.

“ It was replied, That it would be necessary to shew that a salary implying a payment for work, was either a rent charge or an annuity.

“ Moved,

“ That the Rev. John Jones, standing on the poll as voting for a salary issuing out of great tithes, is obliged to register the same under the act for registering annuities or rent charges.

Aye 1, Mr. Owen.

Noes 13.”

K k 3

Richard

Assessment Richard Shadbrook—voted for land in the
Richard Shadbrook occupation of Joseph Lilly. He was school-
School- master of Keysoe, in right of which he received
master. the rent of a farm called Bolnhurst school farm,
 For this he voted. The assessment was of
 “*Bolnhurst school farm, Joseph Lilly (tenant).*”

Against the vote it was said to be exactly the same case with that of *Dunstable charity land*,* before held to be bad*. On the other side it was said, the decisions on the cases of school-masters had proceeded upon a distinction as to such persons: Because the land in these cases being held by trustees, and not belonging to them directly; and their profit from it not being received immediately from the land as rent, but through the medium of the trustees, and in a different shape, it would be impossible for them to get their names entered upon the rate.

Good.

Rev. J. Thompson Another case of the Rev. J. Thompson was under the same circumstances. The assessment was of “*Kimbolton school farm, J. Parsler*” (tenant) which was likewise held good.

John Hill —voted in right of an annuity of £.20 a
Annuity. year, devised to him for life, issuing out of lands charged with it. The lands were devised

* See hereafter the case of W. Ward in p.

in trust, and the annuity was paid to the voter by ^{Assessment} the tenant of the land, by the direction of the ^{John Hill} trustee. He described his freehold at the poll to consist of *house and land*, with the proper tenant. The owner of the estate charged with the annuity was assessed; but the voter was not. The annuity was not registered. It was said in objection to the vote, that it was bad either way; as a freehold estate in land not assessed, and as an annuity not registered; (as in p. 497 in Gale's case.) The ground chiefly relied on in support of the vote was, that the party objecting (the sitting member) had not stated as a cause of objection in the list delivered, the want of registration. The causes of objection there specified being, the voter's having no such estate as described, and not being assessed to the land tax. The counsel for the sitting member, in reply to this, defended their statement of the grounds of objection in the list, by saying, That as they were relative to the description entered on the poll, it could not be necessary to go further than to contradict that description; and as the voter had made no mention there of his *annuity*, no objection could have been raised against that from the entry on the poll.

BAD.

Assessment Daniel Palmer—voted for *house and land* in the
Daniel occupation of John Palmer, and was not assessed.
Palmer. His freehold was an annuity of £.100 a year, de-
Annuity. vised to him before the year 1763, charged upon
the above house and land which belonged to John
Palmer, who was duly assessed to the land tax.

It was objected to the voter, That he was not assessed; and the counsel contended, That he had no such estate as he described, and must abide by that given in at the poll; and 2d, That he could not vote in right of his annuity, because it was not registered according to 3 Geo. III. ch. 24.

The counsel on the other side, as to the first objection, said, That according to the decision in Gale's case, it would be competent to them to support the vote by the annuity. And upon the second point they argued, That the statute 3 Geo. III. ch. 24, did not extend to annuities coming by devise. Because the design of the act is to prevent fraudulent and occasional *grants* of a rent charge, and for this purpose the word *grant* is the ruling phrase in it; which word in law is always used to denote a contract *inter vivos*, and never applied to devises. The regulations prescribed in the act for the registering of annuities, are such as can relate only to such grants, viz. the memorial is to be *under the hand and seal of the grantor*, which cannot be had
after

after his death; and the witness *to the execution* ^{Assessment}
of the grant (a form of expression not usual in ^{Daniel}
 the case of Wills) is to attest the sealing and ^{Palmer,}
 delivery, at the time of registration. This construction of the act is further justified by the second section, which includes expressly the different modes of acquiring annuities by succession, descent, *devise* and promotion, and requires a registration only when these accrue within 12 months before the election*.

The counsel against the vote, in reply seemed less anxious upon the second point, because, they said, they relied upon the effect of the first: That this case bore no resemblance to Gales', because in that, there had been a dispute about the manner in which the voter should *describe* his freehold upon the poll; under which dispute his description was given in subject to future discussion: But here, the voter had of his own accord taken upon him to describe a freehold that he did not possess.

BAD.

Edward Pincard voted for an *annuity* under a ^{Edward}
 will, by which it was charged upon the testator's ^{Pincard.}
 estates. It was not registered, nor assessed to the ^{Annuity.}
 land tax, otherwise than under the names of those to whom the estates belonged.

BAD.

* See the note in p. 499, 500.

Rev.

Assessment Rev. Edmund Whadley voted for *tythes as*
Rev. Edm. *vicar of Houghton*, occupied by T. Brandreth,
Whadley. Esq. The assessment was of *T. Brandreth, Esq.*
Benefice. *for house land and tythes, in his own occupation.*

It appeared that the vicarage had been endowed with the tythe of two pieces of land; and that there was paid to the vicar annually by the impropriator of the great tythes, in consequence of an agreement made a century ago, the price of two quarters of wheat and two of barley, in lieu of this tythe. The present impropriator had paid it to the voter and his predecessors 30 years: He understood the agreement to have been originally made by his ancestor, in order that he might collect the whole tythes of the parish. The parties then contracting agreed, that the one should have the tythes, upon the annual payment to the other of this stipulated price. The deed referred to was not produced to the Committee.

In support of the vote it was argued, That the resolutions of the Committee were applicable only to the common connection of landlord and tenant, which was materially different from that subsisting between this vicar and Mr. Brandreth; who did not hold the tythes in quality of tenant to the vicar. That in such cases, the assessment of the *subject of the vote*, without reference to the owner, was all that could reasonably be expected.

pected. On the other side, the resolution requiring an assessment of *the voter*, was held up as decisive.

Assessment
Rev. Ed.
Whadley.

GOOD.

Rev. Richard Dowbiggen—voted for glebe and tythe in the occupation of Lord Leigh. The assessment was, “ Lord Leigh for tithe occupied by John Mann.” It appeared that Lord Leigh had a lease for lives of the prebend of Leighton Buffard, of which the voter was prebendary. Mann rented the tythe of Lord Leigh, who paid upwards of £.76 a year to the voter, being the reserved rent of his lease of them.

Rev. R.
Dowbiggen.
Benefice.

GOOD.

Rev. W. P. Netherfole—voted for the vicarage of Ledlington. The case was, he received £.10 a year from the impropriator of the great tithes, (Lord Offory) in right of his vicarage; and was no otherwise assessed for it than under the name of Lord Offory. The counsel against the vote contended, That there was nothing in the nature of a vicarage, from whence it could obtain an exception to the assessment act. On the other hand, it was said to be the same as that of Mr. Whadley before determined, and necessarily to be allowed; because it would be impossible for the

Rev. W.
P. Netherfole.
Benefice.

vicar

Assessment vicar to get *his* name inserted in the rate, by any means allowed him by the law.

Good.

James Wittenstal James Wittenstal and his brother Henry, held the estate in jointenancy, and Henry alone was assessed.
Joint Estate.

BAD.

Samuel Charlton. Samuel Charlton—voted for an estate that belonged in equal shares to the voter and his cousin Daniel Charlton. The latter, who was the elder, voted for the petitioner, and was not objected to by the sitting member. Samuel voted for the sitting member, and was objected to for not being assessed. The rate was of *Mr. Charlton*, which, the party objecting contended, should be applied to the elder of the two; and that the sitting member, by not objecting to his vote, had indirectly admitted *him* to be duly assessed under that assessment.
Joint Estate.

BAD.

H. Smith. Hugh Smith, the brother of James, mentioned in p. 424, had held his freehold under the same circumstances as his brother, two years; but the elder brother (Thomas) was assessed for it. In support of the vote, it was contended, That Thomas who had the legal estate, was properly a trustee
Trust Estate.

trustee for his brother; and he being assessed, ^{Assessment} and the voter having possession as of an equitable ^{H. Smith.} estate, the assessment ought to be considered as a virtual one of Hugh the voter.

BAD.

Thomas Harwood, Esq; described his freehold ^{Situation.} to be land in *Colmworth*. In that parish he was ^{T. Har-} not assessed; but he was duly assessed for an estate ^{wood, Esq.} at *Roxton*, a different parish in the same hundred. It was at first contended in support of the vote, That as the mistake did not carry the freehold into a different hundred, it was competent to the parties to prove an assessment for a different estate, provided it were in the same hundred; and that it was not necessary to describe the situation by the *parish*. But afterwards the counsel admitted the vote to be untenable.

Wm. Leigh voted for a tenement in Sandy ^{W. Leigh.} parish, in the poll-book of the hundred of Biggleswade. It was assessed in a rate for the hamlet of Beeston, part of which only is in Sandy. The parish of Sandy is in the hundred of Biggleswade, but Beeston is in that of *Wixamtree*; although with respect to church and poor rates, it is considered as a hamlet of Sandy. From hence arose the objection, that the voter had no freehold *as described* duly assessed, because he voted
in

Affessment in the Biggleswade booth. It was said in answer, That it did not signify in what parish or hamlet the freehold was assessed, provided it were assessed in any.

Good.

Henry
Belfield

—voted for a freehold in *his own* occupation, in the parish of *Studham*. Part of this parish lies in Hertfordshire, the other part in Bedfordshire, in both of which the voter had land. That which he occupied *himself* lay in Herts, that in Bedfordshire was *let*, and the voter was properly assessed for it.

BAD.

Another voter was under the same circumstances in Caddington parish, in the hundred of Flitt. Having two tenants, he named at the poll the one who rented the land in Herts.

Rev. Rob.
Willan

—polled for a vicarage at Cardington. In this parish he was not assessed; but he likewise held the vicarage of Keyfoe in another hundred, for which he was duly assessed. The poll-clerk proved, that the voter was very ill when he came to poll; that another gentleman came with him to speak for him, who said his freeholds were the livings of Cardington and Keyfoe: But he (the clerk) did not enter the latter in the book, because not in his hundred.

The

The voter, in the evening after he had polled, ^{Assessment} finding the entry to be as here stated, desired to ^{Situation.} have it altered, and both vicarages inserted in the book; and application for this purpose was ^{Rev. Rob. Willan.} made to the sheriff, who would not permit it.

It was said in objection to the vote, That he ought to have polled in the book of the hundred in which he was assessed.

BAD.

[In the Cricklade Committee the following ^{Assessment} cases were decided upon this part of the ^{in Cricklade.} subject.

William Hufsey, Esq; voted for a freehold in ^{W. Hufsey} Highworth. This parish consists of several tyth-^{Esq.} ings, each of which is separately rated to the land tax. One of these tythings is named Highworth; in this the voter was not rated, but in another. One side contended, that the objection was established, because the freehold voted for was not assessed. On the other side, it was said to be competent to them to prove an assessment in any one of the tythings of the parish; for it would be unreasonable to appropriate the name of *Highworth* on the poll, to a part only of the parish so called.

The Committee resolved, *That the voter's being rated on the assessment of some or one of the tythings,*

Cricklade *tythings*, part of the mother parish of Higbworth,
Assessment *was sufficient.*

Situation.

H. Mere-
weather

—voted for a freehold in Leigh. The parish is *Leigh* and *Cleverton*; and the assessment was in two divisions, one of Leigh, the other of Cleverton; in the latter of which the voter's freehold was assessed.

GOOD.

William
Clements

—voted for a freehold in Broad Town. This is a *tything* of the parish of Cliff Pepard. The assessment of this parish was in four divisions for the four *tythings* of, 1st, Cliff Pepard; 2d, Cadhill; 3d, Thornhill; 4th, Broad Town, made by the same assessor on the same paper. The voter was assessed in the *tything* of Cliff, but not in that of Broad Town, in which the freehold voted for lay.

BAD.

J. Bailey. John Bailey and two others voted for freeholds in Malmsbury. They were situated in the town of Malmsbury, but in the *parish* of Westport, in which they were assessed. The parish of Malmsbury has an assessment and other parochial rights of its own, and so has Westport. The Committee did not pass any resolution on these votes; but I understood that the counsel, judging from
the

the
tena

B
on,
rule
cases
or of
ment
such
tende
well
bring
could
sary f
to stat
fel for
such w
argued
would
account
ing in
flight
such ca
thing o
names.
for this
fitting,
similar
VOL.

the other decisions, considered them to be un-^{Assessment}tenable.]

Before many objections had been proceeded ^{Mistake of Name.} on, it appeared to be necessary to form some rule for the manner of giving evidence, in those cases that arose from a mistake of the voter's name, or of the description of the estate in the assessment, as several objections depended merely on such mistakes. The counsel on one side contended, That when the objection was apparently well founded, it was incumbent on the others to bring evidence to reconcile the difference, if it could be done; and that it could not be necessary for the party objecting to go further than to state the objection, in such cases. The counsel for the other party admitted, that in general such was the practice in conducting proofs; but argued, that for the convenience of parties, it would be better to proceed differently here, on account of the great expence incurred by sending into the country for evidence upon such slight objections: That the party objecting in such cases ought, on this account, to shew something of a *real* difference of *persons* as well as of names. At the same time they observed, that, for this reason, the Cricklade Committee then sitting, had but a few days before established a similar rule of practice.

Assessment
Mistake of
Name.

The case which brought this subject into discussion was the following: John Musgrave, who voted for a tenement in the occupation of *John Sharman*, was objected to as not assessed. On the assessment there was the name of John Musgrave (landlord) *Himself*, (tenant) which appeared to be owing to a change in the occupation, between the times of the assessment and the election.

The Committee resolved, *That the party objecting to the vote, must prove a real difference, between the property assessed, and that on the poll.*

Geo. Jas.
Gorham.

About the same time, a similar objection occurring to the vote of G. J. Gorham, which was answered in the same manner, by proving a recent change of tenants on the estate, the counsel in support of the vote observed, That such cases ought not to furnish grounds of objection; because a wrong assessment in respect of the *tenant*, could not be corrected by the owner's appeal, if at the same time the owner himself were rated. Upon this case the court resolved,

That the omission or mis-statement of the tenant's name in the assessment, should not be deemed a valid objection to the owner's vote.

Upon the same principle, and in order to promote the convenient dispatch of business,

The

the Committee recommended to the counsel, ^{Assessment}
(and directed it to be entered on their minutes,) ^{Mistake of}

*That when the agents of the party who is to at- Name.
tack any vote on the ground of an error in the as-
sessment, have given in * the objection to such vote,
the agents who are to support that vote, shall give
in * the defence intended to be set up to support that
vote; that the whole case may be brought at once
before the Committee.*

[On the Cricklade trial the following supposed ^{Cricklade}
cases were put, in order to receive the direction
of the court as to the mode of proceeding in
evidence; and to decide upon which party the
burthen of proof should fall, in such cases as are
abovementioned in p. 513, in which a reference
is made to the Cricklade proceedings, viz.

1. A. polls for land in the possession of B.
and is assessed for land in his own possession.
2. A. polls for land in the possession of him-
self, and is assessed for land in the possession of B.
3. A. polls for land in the possession of B. and
is assessed for land in the possession of C.

The question was, Whether in these cases,
the party objecting ought not to prove further,

* It may be necessary to observe, that this order relates to
the conduct of parties *in court*, in the course of the trial;
not to the lists of objections: For many objections may have
been stated against a vote in the list, of which only *one* may
have been proceeded on.

Assessment that the *fact* agreed with these appearances; or
Name. whether the party supporting the vote, should be obliged to give evidence of the circumstances to reconcile them. In the first part of the trial in the hundreds, objections of this sort had given much trouble, by engaging parties in the expence of bringing evidence to establish votes, without any other cause than that of an accidental change in the occupation of the premises, after the assessment was made. This was thought burthensome to the parties, when (as it often happened) there was no substantial objection to the vote. And the Committee, in order to prevent it, resolved, *That in these cases they would consider the voter as duly assessed primâ facie; so as to require evidence to impeach the poll and assessment, from the party objecting.*] See p. 537.

Buckinghamshire. [Upon a question of the same sort, the Buckinghamshire Committee resolved,

That the sitting member (i. e. the party whose vote is objected to) is to be put on proof of the freehold of the voter, where only the same occupier's name as is on the poll, appears on the rate.

The same rule was observed in cases in which the owner's name was not on the rate, but the tenant's only.

That when the Christian name only of the voter is different in the rate and poll, the party is not to be put on the proof.

The

The case upon which the first of these resolutions passed, was of two *Mr. Kings* * in the same parish. William King was objected to by the petitioner, who alledged that the tenant to *Mr. King* named in the rate, was not tenant to *William King*. Assessment
Name.

The second resolution passed on the case of Edward Ryman, the assessment being of *Mr. Ryman*.]

John Hughes. His freehold was assessed by the name of *William Hughes*, with a different tenant from that on the poll. In support of the vote, the John
Hughes.

* There were two *William Wyats* of the same place who polled for Mr. Aubrey, and the petitioner had objected to one of them as not duly assessed. Upon entering into the objection, the sitting member's counsel said, it was necessary for the petitioner to identify the voter objected to; for as only *William Wyat* had been named, it would be enough for them to support the vote of a *William Wyat*; and that the petitioner should have objected to both of them, in order to succeed in his own way. No direct resolution passed on the question; but the petitioner's counsel, understanding from the chairman the sense of the Committee to be against them, abandoned the objection.

In the Gloucestershire case a rule was made for similar objections. There were three voters of the name of John Ballanger, of the same place; and the same difficulty occurring as abovementioned, the Committee resolved, *That as several John Ballangers appear on the poll, the evidence shall be confined to John Ballanger who polled on the first day. Resolves, &c. 126.*

Assessment tenant proved, that there was no other Hughes
Name. in the place than the voter whose estate he
J. Hughes. held, and from hence it was contended to be
 only a mistake of the Christian name of the per-
 son assessed. The counsel on this proposed the
 following rule for such cases, viz. That if there
 was a person in the parish of the names entered
 in the assessment, it would be incumbent on the
 voter to prove himself to be the person intend-
 ed; because the presumption would be towards
 the person bearing those names: But that it should
 be presumed to be a clerical mistake of the
 name of the right person, where no other person
 answering to it lived in the place. Except in
 such cases as where a father and son having dif-
 ferent Christian names, the deceased father's
 name remained on the assessment beyond the two
 years after the son had been in possession: In
 these cases the assessment of the father could not
 be appropriated to the son.

The Committee held this vote to be good.
 In cases where the father's name remained on
 the assessment after the time, they did not allow
 the son's freehold to be duly assessed thereby;
 unless it appeared, that the assessor believed it to
 be the son's name, and used it by mistake for
 him. Upon these occasions and others of the
 same kind, in which doubts arose from the names
 in the rate, the assessors were called as witnesses
 to explain them.

Sir

Sir Robert Barnard. The assessment being in ^{Assessment} the name of his father Sir *John*, as it had re- ^{Name.} main-
 ed for some years, and there being no rea- ^{Sir R.} son to ~~suppose~~ it a mistake of the name of Sir ^{Barnard.} Robert, his vote was admitted to be bad by the
 counsel who were to support it.

Richard Beaumont. The assessment was of ^{Richard} *Robert*. In answer to the objection it was prov- ^{Beaumont}
 ed, that there was none of the latter name on the
 estate, and thence it was contended to be only
 a clerical error and misnomer of the right person.

Good.

S. Safford. His freehold was occupied by Geo. S. Safford.
 Stratton, and the assessment was of *John* Safford
 (landlord), Geo. Stratton (tenant.) It appear-
 ed that John was the name of a brother of
 the voter's, who died in 1783 before the as-
 sessment was made, and had not had any right
 to the estate. The voter had succeeded a bro-
 ther named William, in whose time the assess-
 ment was of *Mr. Safford*. This was contended
 (in support of the vote) to be merely a mistake
 of the voter's Christian name.

Good.

H. Wagstaffe described his freehold on the poll, ^{Henry} as occupied by Wm. Day. The entry referred to ^{Wagstaffe.}
 in the assessment, was "*William* Wagstaffe—
 William Watts (tenant)." The voter had no
 such tenant at the time of the assessment; at

Assessment which time and at the election his freehold
Name. was occupied by William Day. Watts had been
 the tenant, and quitted about two years before,
 Henry Wagstaffe, when Day took the farm. The assessor gave
 evidence, that there had not before been a *William*
Wagstaffe on the estate: That the name of the
 voter's father, whom he succeeded, was Henry;
 and that he (the assessor) meant to assess the
 voter by this name of William, which he then
 supposed to be his name. The counsel against
 the vote contended, That as Day was the tenant
 when the assessment was made, and the voter
 was at that time the owner, a rating under other
 names ought not to be allowed: That as Watts
 had never been tenant to the voter, and as the
 name of Wagstaffe was common in that district,
 the entry referred to was probably intended for
 some other person. In support of the vote it
 was said to be merely a misnomer, according to
 the assessor's evidence; if it were not so, the fact
 might easily and ought to have been proved, in
 support of the objection. That a wrong de-
 scription of the *tenant* was no ground for reject-
 ing the assessment, Good.

W. Paine.—The assessment was of *Jane Sloper*, with Wm.
 Paine named as the tenant, as he then was.

BAD.

S. Clark.—The assessment was by the name of *Billington*
Town land, and that of the occupier. This was
 held

held bad. So, of Thomas Roberts, under an ^{Assessment} assessment of *the heirs of Thomas Foskey*. Roberts ^{Name.} was the grandson of Thomas Foskey, who had ^{S. Clark.} died two years before the election. So, the vote of William Ward, under the assessment of *Dun-* W. Ward. *stable Charity*: Likewise the assessment of *Meak-* *ham's Children*, with the right tenant's name.

Dixey Gregory.—His freehold was assessed un- ^{Dixey} ^{Gregory.} der the words *Late Franklin's*. It was his in right of his wife, to whom he had been married two years, whose mother's name (from whom the estate came) was Franklin. The counsel on the other side admitted this assessment to be bad within the terms of the Committee's resolution.

Francis White.—The entry in the assessment ^{Francis} ^{White.} was "Late White's in dispute."

Good.

On a subsequent day, when the counsel referred to this decision in their arguments, one of the members said, "They had allowed this assessment, on the effect of the words *in dispute*, which shewed the right to have been uncertain; and till the ownership was ascertained, there was none to appeal against the rate; and that the party objecting to the vote, had not proved that at the time of the assessment, or within the time of appealing, this *dispute* had been settled; which if he had done, the objection might have been established.

John

Assessment
Name.

J. Lilley.

John Lilley voted for a tenement occupied by Thomas Burton. He had a brother Joseph, who had a freehold in the same parish, occupied by William Laughton. The assessor had entered on the rate the name of John Lilley only for both tenements, (by which he meant the father of these two, whom he thought the owner of both tenements, as he managed both) and placed the amount of the tax for both tenements, opposite to his name, with the name of William Laughton as the tenant of both. He did this, because he thought Laughton a responsible man, and that he should have difficulty in obtaining the tax from Burton.

BAD.

Martin
George

—voted for a freehold at Eaton Socon, in the occupation of Shefford *and others*: On the assessment, the occupier was *Himself*. The objection was supported by evidence, that no person of the name of Shefford lived in Eaton Socon; that the voter's estate there was held by different persons; that George in discoursing of his vote after the election, had said, he had named a wrong tenant at the poll, as the one he had mentioned held an estate of him at *Keyoe*, and not at Eaton. From hence the counsel argued, that this case was like that of Odell (*in p. 444*) and within the rule there made. To obviate the effect of this evidence, it was proved that
this

this estate at Keyfoe was occupied by *one* person, Affessment
 from which it was inferred, that if he had in- ^{Name.}
 tended to vote for it, he would not have de-
 scribed it as occupied by *several*. It was con- ^{Martin}
 tended too, that though Shefford were not the ^{George.}
 tenant of the estate voted for, yet the addition
 of *and others*, in describing it, would enable the
 party to support the vote, by shewing who the
 actual tenants were.

GOOD.

Richard Fitchett was assessed under the name Richard
 of *Mitchell*, which the assessor supposed to be his ^{Fitchett.}
 name; meaning to assess him as the owner of the
 estate.

GOOD.

Thomas Harrison was assessed by the name of ^{Thomas}
Harris, by which name, according to the evidence ^{Harrison}
 of his neighbours, he appeared to be known as
 well as by that of Harrison.

GOOD.

J. Harrodine. The same decision passed upon J. Harro-
 dine. ^{dine.}
 the case of one who voted by the name of *Har-*
rodine, and was generally called Bartle; who
 was assessed by the latter name, by which he
 was most commonly known, though his real
 name was Harrodine.

John Vernon, jun. Esq; voted for a freehold Form of
 in the occupation of James Harris. The as- ^{the Rate.}
 sessment was in the following form: ^{John Ver-}
 Land- ^{non, Esq.}

Assessment	Landlord.	Tenant.
Form of the Rate.	Mr. Vernon.	Daniel Cleaton.
	Ditto.	Isaac Pennyfather.
John Vernon, jun.	Ditto.	James Harris.

John Vernon, sen. had voted for the estate occupied by Daniel Cleaton; and the party objecting contended, that these several assessments referred to the *same person* by means of *Ditto* repeated. On the other hand, Mr. Vernon, sen. proved that Harris was tenant to his son, not to him, as did the tenant himself.

Thomas
Whittall.

GOOD,

His name in the assessment stood in the column of tenants; but it was in this form, viz.

“W^m Boyes and | Tho^s Whittall | £0, 59, 0, |
The estate belonged to these two. In support of the vote it was said, that Whittall could not have procured a different method of assessment, if he had appealed against the rate, because he could not require more than to be named upon it *. On the other hand it was said, that neither was assessed to any *particular*

* But upon an appeal, the Commissioners must necessarily direct an assessment according to the form prescribed in the act. See it in p. 479.

The latter argument seems to proceed on a misunderstanding of the clause alluded to; which has in view the separate assessments of different estates, held by the *same tenant* of different owners.

sum,

sum, and the rate was therefore bad, according ^{Assessment} to the third section of the statute; by which the ^{Thomas} proportions of the tax to be paid by each several ^{Whistall} owner, where the occupation is joint, are expressly required to be charged.

BAD.

J. Tansley. His freehold consisted of a field let ^{Mode of} for a guinea a year, and two houses, the one let ^{Rating.} for 26 shillings and the other for twenty-four. J. Tansley

It was the custom of the parish where they were situated, to assess *land* only, and no houses whatever to the land tax; and though the land and house were adjoining parts of the same tenement, the land tax was always laid upon the land. The voter was assessed for this field only. The sum charged upon it to the tax was four shillings, which was rather more than the usual rate, according to poundage in that parish, for the rent of a guinea.

In objection to the voter it was said, That he had not a freehold of forty shillings value assessed to the land tax; for his *land*, which alone was assessed, did not amount to that sum. That in order to support the vote, it must be contended that the houses are *virtually* assessed; which mode of assessment it was a principal object in making the late statute to prevent, and therefore the Committee ought not to allow it.

On the other side it was said, That the particular mode in which the assessors may choose

to

Assessment to execute their duty, ought not to prejudice
Mode of the right of voting; that the difference, still,
Rating. between this mode of assessing property and the
 J. Tanfley common one, consisted more in form than substance; because it was plain, that though land alone was expressed, the rate was not framed in proportion to the value of that alone, but with relation to other property; as appeared from the sum charged on this land. That in another point of view, the vote ought also to be considered as good: It being clear, that the voter possessed forty shillings a year of freehold, and that he was duly assessed for part of it; which, in the present case, must be deemed a satisfaction of the law, from the particular usage of the parish.

GOOD.

Rev. Hen.
 Hinde

—voted for house and land in his *own occupation*. For this, which was the parsonage house, he was not assessed; but he had three tenements in the parish held by others his tenants, for which he was assessed. The assessor said in his evidence, that it was not usual in his parish to assess the clergyman for the house he lived in.

It was contended, That the vote must be rejected, because the freehold for which the vote was given, was not assessed; and the party could not now rely upon any other freehold than that given in at the poll.

On

On the other side, it was said to be sufficient Assessment for the support of this vote, that the freeholder ^{Rev. Hen.} was assessed for a freehold *in the parish* named ^{Hinde.} at the poll, though it might not happen to be precisely the estate named; because, the locality being ascertained, the opposite party could not be misled in their inquiries; and a reference to the rate would shew at once, that the voter's property was assessed. But if it were not so, this particular case should be distinguished, on account of the practice in the place to omit the clergyman's own house from the rate.

GOOD.

James Crouch. In that copy of the rate which ^{Duplicates} was given to the clerk of the peace, and by which ^{James} the court proceeded, he did not appear to be as- ^{Crouch.} fessed: But in one of the duplicates in the hands of the Commissioners of the land tax, he was so. It was contended, that all the duplicates of the assessment were equally authentic.

GOOD.

William Geary, Esq. In the duplicate left with ^{W. Geary,} the clerk of the peace, there was no sum affixed to ^{Esq.} his name, and therefore it was objected, that he was not duly assessed: The counsel contending, that the statute intended to make the duplicates in the custody of the clerks of the peace, conclusive evidence of the assessment. In support of the vote the assessor produced the original rate,
in

Assessment in which the sum of 14l. 4s. 8d. was written opposite to the voter's name; he also said, that **W. Geary, Esq.** if the copy he had made out for the clerk of the peace, differed from that in any respect, it had been by mistake. It was likewise contended by the counsel for the vote, that the act required *assessment* only, and not *assessment* in particular *sums*.
 GOOD.

Infancy. Thomas Cave. His mother was assessed. His freehold was devised to him by his father's will, and he came of age within a year before the election.
 T. Cave. GOOD.

Richard Pedder —voted for a freehold in his own occupation. It was assessed under the name of Thomas Britton, as owner and occupier. Britton married the voter's mother, and held possession of this estate till the voter came of age. The latter did not obtain possession of it, till the Michaelmas before the election.
 GOOD.

William Mantle. —This was like the foregoing case of Pedder, except that here, the son (the voter) was *twenty five* years old. It was the mother's till he came of age, and the step-father, since that time, received the rents for his use.
 BAD.

Henry Field. —The assessment for his freehold was of Thomas Field his elder brother. The father had been

been dead some years, and the elder brother ^{Assessment} managed his estate, (which was devised to the ^{Infancy.} children equally) and was rated for the whole, ^{H. Field.} including the voter's part of it. Henry came of age in May 1783; but this was unknown to the assessor of the parish.

It was contended, that this vote ought to be allowed upon the same principle as that of Pedder; because the time of the voter's taking by the devise, ought, for this purpose, to be reckoned from the day of his coming of age; which would bring the case within the exception of the act.

Good.

The Assessment was thus: "Mr. Bull—^{Marriage.} Thomas Joyce" (tenant). The voter polled for ^{Thomas} his wife's estate, whom he married a very short Joyce. time before the election. She was the daughter of one Love, from whom she derived the estate, and came of age within two years before the election; and at the same time obtained possession of the estate from her guardian Mr. Bull. He had married Love's widow; and in right of his wife had managed the estate of the voter's wife, as her guardian, till her coming of age, and as such came to be named in the assessment. The voter was in possession of the estate as *tenant* when the rate was made, and before his marriage.

Assessment

Marriage.

Thomas
Joyce.

Against the vote it was said, That the exception in the second section of the act, did not extend to this case; because it did not appear that the tenement had been assessed "within two years next before the election, in the name of the person through whom the voter claimed." That he claimed nothing through *Bull*, but in right of his wife, and she from her father. And further, that *Bull* had an interest personal to himself in the estate, by marrying the widow, who was intitled to dower; for *this* he must be supposed in law to have been assessed, and not as guardian of his wife's daughter.

On the other side it was said, That the wife having come of age within the two years, and having then got possession of the estate from *Mr. Bull*, who acted as her guardian, the rating of him ought, (consistently with the former decisions of the Committee, in the cases of *Pedder* and *Field*) to be taken, upon an equitable construction of the statute, to be within the exception.

BAD.

Ja. Brasier—had a freehold in right of his wife, whom he married in 1780. It was assessed in the name of *Mrs. Brasier*, together with that of the tenant.

In support of the vote it was said, That as this estate was the husband's only *in right of his wife*, an assessment in her name with the tenant's, was according to the statute, an assessment of

the latter *as tenant to the owner*; or, if this point ^{Assessment} should fail, the Committee (rather than strike ^{Ja. Brasier} off a vote under such circumstances) ought to believe the entry of the word *Mrs.* in the assessment a mistake for *Mr.*

In objection to the vote it was said, That the *owner* described in the act, is the person claiming to vote; and though an estate may be the husband's in right of his wife, still it is the *husband's* estate, and he ought to be assessed for it.

BAD.

Richard Stanyan succeeded to the estate for ^{Descent.} which he voted, as heir at law to a Mrs. Wag- ^{Richard}staffe who died more than two years before the ^{Stanyan.} election: But he did not know of his right till within a year before it, and after the assessment of 1783 was made out, and did not get into possession till some months afterwards; which time was employed in making out his title to the satisfaction of the tenants. The estate was assessed under the name of *Mrs. Wagstaffe*.

In support of the vote it was contended, That the case came within the reason of the exception for cases of descent within a year before the election; the voter having been guilty of no default or neglect: That it resembled the case before determined, with respect to voters who had obtained possession of their estates on their coming of age, though intitled to them many

Assessment years before. In answer to which it was said,
Richard That the law supposes all men to be careful of
Stanyan. their own interests, and lends no aid to those
 who are not so; that the voter had had an
 opportunity of appealing against the rate, if he
 had thought proper, and had neglected it.

BAD.

Evidence. In the lists of voters objected to, the peti-
 tioner had stated as the cause of objection to one,
 that he was *not duly assessed*, as the only cause.
 The sitting member produced an assessment,
 which was alledged to apply to him, in which
 the sum charged was 6*s.* 9*d*; and the petitioner
 endeavoured to shew, from the amount of the
 tax compared with the value of the land, (which
 was alledged to be under 40*s.*) that this assess-
 ment did not apply to the freehold described on
 the poll; for which purpose it was necessary to
 inquire into the value of the estate so assessed.
 The sitting member opposed the petitioner's
 right to make this inquiry, on the ground of its
 opening an objection to the value of the free-
 hold, which he had no right to proceed upon
 now; because he had not stated it among his
 heads of objection in the lists. In answer to
 this, the counsel cited a case in the Milbourn
 Port Committee in 1781, which was thus: "A
 witness on the part of the petitioner was called
 to prove agency to the sitting members, by or-
 dering

dering treats and dinners at a tavern, and paying Affessment for them on their behalf. The counsel for the latter objected to this evidence, because there was no charge of *Treating* in the petition, and it might avoid the election, according to the Treating act:—That upon a trial of felony, the proof must not be by evidence of *another* felony. In actions for slander, when matter of aggravation is offered by proving other slander than that declared upon, it is never permitted to give evidence of such slander as would furnish another *substantive* cause of action; because a man is not to be tried upon any other charge than is alledged against him. On the other hand it was observed, That the Committee need not apply the evidence further than the counsel urged it, i. e. to prove agency between the parties. But further, they said, Treating was one species of bribery, and their petition contained a direct and principal charge as to that. Upon which the Committee resolved, That the counsel might produce the evidence *to prove the agency**. After stating

* I was present in this Committee when the above question arose. After the resolution was communicated, the counsel for the sitting members said, That the petitioner could not absolve the Committee from administering the law according to their oaths, if the material facts should appear in evidence before them.

It was there mentioned in the course of the argument, that in the first petition presented on the Worcester election of

Assessment stating this case, they admitted likewise, that
Evidence. if on their inquiry it should be found that the freehold were under value, they could not avail themselves of it in any other way, than as tending to establish the objection specified in the list: But thus far they claimed a right to make the inquiry into the value.

The Committee deliberated on the point, and delivered their opinion, *That the petitioner might prosecute the inquiry, for the purpose of ascertaining the question arising upon the assessment.*

1773, a charge against the sitting member for treating, had been omitted; and that afterwards, upon a consultation had with the petitioner's counsel, a supplemental petition was presented, chiefly for the purpose of setting forth that charge; from an opinion entertained by them, that a select committee would not allow the petitioner to give evidence of it, if it should not have been made a substantive charge in the petition. I have read these petitions in the Journal, (See 34 Journ. 400 and 425, January 20 and 31, 1774) the contents of which are according to the above statement of them. The first is by the unsuccessful candidate: The second by the freemen in his interest, containing no other substantive charge than that of treating.

[CRICKLADE ASSESSMENTS.]

Decisions of the CRICKLADE Committee, under
their Construction of the Assessment Act, 20
Geo. III. ch. 17.

I place the following cases (though so few in number) by themselves, because depending on the different rules of construction, by which this Committee were led to form a judgment of the above statute, differently from that of Bedfordshire. The different decisions in these committees of some cases apparently the same, might appear contradictory, if they were to be read as corresponding judgments of the *same* cases. Whereas, the only difference between them was the first and fundamental one, upon the general construction of the act. The particular decisions upon the votes, are to be considered as corollaries from and dependent upon that: And they are therefore, in truth, neither an affirmation of each other, where they seem to agree, nor the contrary, where they may seem to differ.

This subject received the consideration of the Cricklade Committee, some days before the resolution upon it in that of Bedfordshire. It was

Cricklade
Assessment

treated in the same manner in both, and the same arguments were employed by the counsel. In this observation likewise the Buckinghamshire case may be included. I shall therefore only state the case and resolution, conformably to the method I have followed upon all questions that have been decided in these different elections in the same shape, for the second or third time. It happened too, that some of the same counsel were engaged in all the three here presented to the reader: So that it can hardly be supposed that they took a different course of argument in any of them,

The question here arose after the case of the sitting members had been opened, upon the first objection taken by their counsel; which was to the vote of a freeholder of the parish of Ashton Keines. No case had occurred before, that made it absolutely necessary to enter upon the construction of the statute; but it was thought so in this. The sitting member's counsel here contended for that construction, which in the Bedfordshire case was afterwards maintained on the part of Lord Ongley; insisting upon an adherence to the form directed by the statute.

The Committee resolved,

That such freeholders as were assessed for the premises in respect of which they claimed to vote, either

either in their own names, or in the names of their tenants actually occupying the same as tenants of such freeholders, were intitled to vote at the late election for the borough of Cricklade.

In the abovementioned rate of Ashton Keines, there were many names standing singly, with the sums for which they were charged set opposite to them; by which the persons assessed were not described to be either landlords or tenants. It was said by the party objecting, That the rate itself was sufficient evidence of the objection, according to the above resolution. On the other side, it was said to be necessary to go further in proof of the objection, by calling the assessors to explain who the persons assessed were; because the names standing alone should be presumed to be those of the owners, and then the assessment would be proper.

The Committee resolved,

That the party who wished to substantiate a vote included in the Ashton Keines assessment, should produce the assessor.

Jacob and Broom Pinnegar, an uncle and J. and B. nephew, held an estate in common, for which they voted. It was rated thus: "The Mr. Pinnegars."

This was held a good assessment of each.

Robert

Cricklade
Assessment Robert Hapgood voted for a freehold occupied by W. Hill. The voter and his brother James had two houses adjoining together, let by them as one tenement to Hill; But the rate was thus; "*James Hapgood—W. Hill.*"

BAD.

W. Jacobs —was rated together with six other persons, all in the occupation of their premises, in one joint sum of £.5 12s. the whole seven being braced together in a circumflex opposite to that sum.

GOOD.

Wm. Price —voted for a freehold in the possession of Richard Dibbins. The voter's name was not in the rate; but that of Dibbins was, as tenant to S. Price. The counsel in support of the vote offered to prove by the assessor, that he was tenant to the voter, and not to S. Price. This was objected to on the other side, and the resolution (in p. 536) was held up as conclusive against it.

The Committee would not receive the evidence, and held the voter not to be duly assessed.

J. Munday —voted for land occupied by William Lewis. The name of *William* Munday with W. Lewis as his tenant, was in the assessment: And the counsel for the vote offered to prove that there

was

was no *William* Munday in the parish, and consequently that *James* must have been the person ^{Cricklade} Assessment intended.

But this evidence was opposed on the other side, and refused by the Committee.

William Kempe voted for a freehold which *W. Kempe* belonged to him as schoolmaster of Lineham. The assessment was of "The schoolmaster of Lineham."

GOOD.

[In the Buckinghamshire case, the question ^{Buckinghamshire} on this act was argued on the fourth day of the trial. That Committee resolved,

That it is not necessary that the name of the owner should appear upon the rate.

This was the only resolution passed by them upon this law; the trial ending three days after, and no particular case of assessment having required a decision, except upon those points of evidence mentioned in p. 516.]

IV. CASES of PERSONAL DISQUALIFICATIONS.

Not a year
in posses-
sion.

J. Fresh-
water

J. Freshwater was objected to by the petitioner under these circumstances: He purchased his freehold on the 26th of April 1783, having then for the first time bargained for it. The conveyance was not executed till the beginning of May following. His bargain gave him the estate from the Lady-day preceding the purchase, and he enjoyed it accordingly; and the seller paid no taxes, and derived no profit from it after that day. This election began April 7, 1784, and the return was made on the 19th following.

This case being satisfactorily proved, the counsel for the sitting member gave up the vote, admitting it to be

BAD.

W. Smith—had been in possession of his freehold more than a year before the election, under a contract for the purchase of as long standing: But *all* the purchase money was not paid, nor was the conveyance executed by the seller, till six months before the election.

GOOD.

Thomas

Thomas Shepherd succeeded to his freehold as one of the bailiffs of Bedford, in right of that office, upon the death of the last incumbent within a few months before the election *. The only objections stated in the lists against his vote were, the want of due assessment and being under value, which being considered as not established, the vote was held

Not a year
in possession.

Thomas
Shepherd.

Good.

Thomas Barringer was objected to by the sitting member as being a collector of the duties on houses and windows, under the disqualifying stat. 22 Geo. III. ch. 41, which excludes the vote of "any surveyor, collector, comptroller, inspector, officer, or other person employed in collecting, managing, or receiving the duties on windows or houses."

Disqual.
Office.

Thomas
Barringer.

In order to understand this subject, it is necessary to refer to the stat. 20 Geo. II. ch. 3, by which all former duties upon houses and windows were repealed, and new ones imposed, with new powers and a new mode of collection added. The following sections of the statute are the most material to this point.

Sect. 6, enacts, That all the commissioners of the land tax for the year 1747, or who should

* See p. 368.

there-

Disqual.
Office.

Thomas
Barringer.

thereafter be appointed commissioners of the land tax, should be commissioners for putting in execution that act; which said commissioners are directed to meet together at the most usual place within their counties, &c. on or before the 18th of April, 1747, and in like manner to meet yearly at the appointed times of the land tax meetings, and to divide themselves for the execution of the act, in hundreds, &c. within their limits, in such manner as to them shall seem meet; and to direct their precepts to such inhabitants and such number of them as they shall think most convenient to be presentors and assessors, requiring them to appear before the commissioners, at such time and place as they shall appoint, not exceeding ten days; and at such their appearances, to read to them the several rates and duties in the act mentioned, and openly declare the effect of their charge unto them, and how they ought to make their certificates and assessments according to the several rates aforesaid; and then to prefix another day for the said persons to appear before the commissioners, and bring in their certificates in writing under their hands, to be verified upon their oaths, of every dwelling house inhabited and charged by this act, within the limits of those places for which they are to act; and of the number of windows, &c. and of the several
sums

sums of money, &c. without concealment or Disqual. favor; upon pain of forfeiture of any sum not ^{Office.} exceeding five pounds, nor less than forty shillings: And also then to return the names of two or more able and sufficient persons, within the bounds or limits of those parishes or places where they shall be assessors respectively, to be collectors of the several rates and duties granted to his majesty by this act; for whose paying to the receiver general such money as they shall be charged withall, the parish or place by whom they are so employed shall be answerable: And every assessor so appointed shall, before he take upon him the execution of the said employment, take the oaths of allegiance and supremacy.

By sect. 7, the particular duty of the *collectors* is prescribed to them, and they are required to pay over their receipts to the receiver general, his deputy or deputies.

In sect. 9, the collectors are enjoined and required to collect and pay, &c. under the several penalties and forfeitures in the act provided.

Sect. 30, impowers the *lords of the treasury* to appoint *surveyors* and *inspectors* for examining and controlling the assessments and certificates of the collectors, with full powers for the above purposes.

Sect. 43, impowers them to give salaries to the *surveyors* and other officers for their service.

The

Disqual.
Office.

Thomas
Barringer.

The material parts of stat. 20 Geo. II. ch. 3, are preserved in the subsequent acts, by which the same duties have been continued or extended.

By sect. 2, of 22 Geo. III. ch. 41, it is provided, That nothing in the act shall extend to any person or persons, for or by reason of his or their being a commissioner or commissioners of the land tax, or for or by reason of his or their acting by or under the appointment of such commissioners of the land tax, for the purpose of assessing levying collecting receiving or managing *the land tax, or any other rates or duties* already granted or imposed, or which shall hereafter be granted or imposed by authority of parliament. The third section provides for the exception of offices held by patent for a freehold term; and the fourth contains an exception of "any person who shall resign his office or employment on or before the 1st of August, 1782."

The objection to the vote was supported by the following arguments of the counsel for Lord Ongley.

The declared intent of this act was to reduce the influence of government in elections, by annihilating the votes of all those persons who held offices or situations, in which that influence is likely to direct them. The act considers in this character, and expressly excludes from voting a *collector* of the window tax, which office the voter

vo
and
plo
if i
as i
fere
coll
term
in co
that
with
fied.
viso
by w
of th
cepte
the fa
constr
statute
which
But
for the
mission
person
may t
meeting
respect
business
commi
VOL.

voter holds. It has likewise the following general Disqual. and comprehensive words, "or *other person em-* Office. *employed in collecting the duties, &c.*" So that Thomas Barringer. if it could be supposed that the word *collector*, as it stands, was intended for an officer of a different description from those commonly called collectors, still the voter would be within the terms of the disqualification, as *a person employed in collecting the duty*. It must therefore be shewn, that there is something in the act inconsistent with itself, if such person is not to be disqualified. It may perhaps be argued, that the proviso in the second section will have this effect; by which, persons acting under the appointment of the commissioners of the land tax, are excepted out of the clause of disqualification. If the facts warranted it, this would be a strained construction, to repeal an enacting clause of a statute by a proviso; a mode of construction which is to be rejected.

But the case will not admit of this argument, for the collector is not appointed by the commissioners of the *land tax*. Although the same persons are commissioners of both taxes, and may transact the business of both at the same meetings, they act in several capacities in each respectively. When they proceed upon the business of the window tax, they stile themselves commissioners for that duty, and not of the land

Disqual.
Office.

Thomas
Barringer.

tax. Just so, if the same persons happened to be the commissioners of the customs and excise at the same time, they would not act as commissioners of the customs, in the affairs of the excise.

Penalties are annexed to their acting without qualifying. Now if an action were brought for the penalty, the declaration would state that they acted as commissioners of *the window tax*, or else the penalty would not be recovered.

The Chancellor and Judges are trustees of the British Museum: The same persons are Governors of Greenwich Hospital. It might as well be argued, that they would act as Trustees of the Museum, in any matter relating to the government of the Hospital.

The only expression that seems to give that sense which the other side would put upon this proviso, is in the exception of persons appointed by the commissioners of the land tax, for the purposes of the land tax or of any *other rates or duties*. But the preceding sentence restrains it to the *commissioners of the land tax*, and plainly controls the meaning of the words following them. Further, it was necessary to add them on account of the other rates which are managed by the commissioners of the land tax, as such—as the place tax, and (a little before this act passed) the servant's tax. This latter tax had been about that time put under a new regulation, and the manage-

management of it taken from the land tax board Disqual.
to that of the excise. No other reason could be Office.
given for inserting these words, but that arising Thomas
from this circumstance. The mode of collecting Barringer,
the land tax being such as to admit of very little
of the influence of government upon those con-
cerned in it, it was thought proper to make
them an exception; and to extend it to any
other branches of the revenue depending on the
same management: But it extends no further.
The tax on houses and windows is independent
of the authority of the land tax commissioners,
and has commissioners for itself, and distinct
officers throughout.

The actual state of the management of these
taxes in the city of London, is a clear illustration
of the foregoing arguments. There, the same
persons are not the commissioners of both duties,
as in other places, but differently constituted;
and a different qualification is required in order
to act as a commissioner of the window tax from
that of the land tax. The same regulation
might be made all over the kingdom. The acci-
dental connection of the two characters can fur-
nish no substantial ground for determining the
extent and effect of the law.

The counsel for Mr. St. John used the
following arguments in support of the vote.

Disqual.
Office.

Thomas
Barringer.

It is admitted that the end of the statute in question, was to abridge the influence of government in elections, by cutting off the votes of persons lying under that influence; and the means of its operation on individuals are violent, by depriving them of a valuable franchise, and of the use of a private right. Therefore, in order to give effect to the law, the construction of it ought not to be carried further in any doubtful parts, than to lay the restraint on such persons only.

The saving clause of the statute, and the nature of the office of collectors of the window tax, will shew that it could not be intended to exclude them from voting. The act, when speaking of *commissioners of the land tax*, means to include the whole of their office, and to use the words in the common application of them to all the several branches of their duty. Commissioners of the land tax are always appointed to manage the window and house tax, as well as the place tax; for which reason, the second section involves them altogether, and makes only one class of the several persons, whose appointment depends on the same authority; for in this manner the end of the act was thought to be sufficiently answered. The mode of managing these branches of the revenue not being thought (as the counsel on the other side allow) to render
the

the persons employed in them dependent on government. If the act had not intended this, it would hardly have used the plural words *any other duties*; when, according to the other construction, these words include the place tax only. It is said on the other side, that this is a *strained* construction; but it is the most consonant to the spirit and end of the act, and within the express words of the second section. They say a proviso ought not to be construed so as to repeal an act: But this is no repeal; it is only a limitation, which is always the effect of a proviso in statutes; that general provisions may not have too extensive an operation, where the general words used might otherwise lead to it.

An argument might be urged from the order in which the act classes the several persons enumerated, in the management of the window tax, when the nature of a collector's office and appointment is considered. It begins with the *surveyor*; next to which comes the *collector*; and after that come *comptroller*, *inspector*, *officer*. Yet the persons generally called collectors, and holding the office possessed by the voter, are of an inferior rank in this department both to comptrollers and inspectors. Hence it might be inferred, that the legislature had in view some other description of persons than these, (probably the *receivers*, or surveyors and inspectors, who

Disqual.
Office.
Thomas
Barringer.

Disqual. are appointed and paid by the treasury) to whom
Office. it gave this name of collectors.

Thomas
Barringer.

The nature of the office shews that it could not have been a subject in the contemplation of those who framed the statute. It is not lucrative, but burthensome; it is not under the appointment of government, nor sought for by the persons bearing it, but imposed on them; and they are obliged to execute it, or they may be punished. The stat. 20 Geo. II. ch. 3, sect. 6, describes the manner of appointing collectors, which is more in the manner of parish offices, than of appointments under government. Those officers who receive their places from the treasury, as the surveyors and inspectors, are paid by a salary from the treasury. But collectors have none: Their small profit arising from a per-centage on the revenue, is too inconsiderable to repay their labour in the collection.

The fourth section of the disqualifying act is a strong confirmation of the foregoing argument. It preserves the rights of those who shall resign their offices before a certain day. This is a convincing proof that none were intended to be disqualified, but those who held offices worth holding, and which might be resigned. But collectors of the window tax cannot resign their offices, which they are compelled, and in general against their inclination, to execute. If in any subsequent

subsequent act for the collection of this duty, the method of appointing and paying the collectors should be altered; if they should receive their appointment and pay from the treasury, and both were to become lucrative, in such case it would be reasonable to include them among the persons disqualified. But in the present case, such a construction would pervert the design of the legislature.

Disqual.
Office.

Thomas
Barringer.

The Committee determined, *That the voter was not disqualified* *.

The foregoing argument was introduced by an objection made on the part of the petitioner, to the evidence offered by the sitting member to prove his objection to *Thomas Barringer*, viz. that he was a collector of the window tax. After the Committee had deliberated, the chairman informed the counsel that they had negatived the following motion, viz.

That any collectors or assessors, appointed by or acting under the commissioners of the land tax,

* The above determination was of great importance to the parties in this cause, as the objection was said to extend to 51 persons.

It is curious to observe in the progress of a law made against the inclinations of a minister, and in order to lessen the influence of all succeeding ministers, a party supporting the administration contending for the most extensive effect of the law, and the restriction of it maintained by the party in opposition; as it happened in this instance.

Disqual. *whether acting as such, or as commissioners for the*
 Office. *management of the duties on houses and windows,*
 Thomas *or for the management of any other rates or duties*
 Barringer. *imposed or to be imposed by parliament, are disqua-*
lified from voting at elections of members to serve in
parliament.

[In the Buckinghamshire Committee, the above objection was made in the same manner by the petitioner there, and received a similar determination.]

Jⁿ. Arch — was objected to by the petitioner, as being a subdistributor of stamps.

The words of the disqualifying act on which the objection was founded, are the following: “ Any commissioner, officer, or other person concerned or employed in collecting, receiving, or managing any of the duties on stamped vellum parchment and paper; nor any person appointed by the commissioners for distributing of stamps.”

The voter had been appointed by the distributor of stamps for the county, a subdistributor for the district of Shefford. The nature of the appointment is this, as it was related in the evidence of Mr. Leach, the distributor for Bedfordshire. The distributor appoints whom he pleases, as his assistants in the distribution,

for

for the convenience of collecting the revenue, by the direction of the board of Commissioners, and makes a return to them of their names once a year. But the Commissioners exercise no contrall over them; though if they were to disapprove of any person so appointed, the distributor would remove him. But this would be by his own authority. The distributor is answerable for what money the subdistributors receive, and they to him. The profit of the appointment to the subdistributors, is 2l. 10s. per cent. on the money collected by them; to the former 5l. per cent.

The subdistributors likewise make out licences for carts, waggons, and horses, and sign them with their own names.

The objection to the voter was supported by the following arguments:

The design of this law being to diminish the influence of government in elections, the construction of it ought to be such as best to advance this design, which was thought so remedial to the constitution. If persons in the situation of the voter are necessarily subject to that influence, they come within the scope of the statute; and certainly the expressions of it, include them by name.

Now the appointment under which the voter acts, renders him dependent upon the person appointing

Disqual.
Office.

J. Arch.

appointing him, (an immediate servant of government) as far as the profit of the place extends, which must necessarily be advantageous to the officer. And though he is not immediately appointed by government, his situation is in effect the same; because if the Commissioners were to disapprove of him, he would be removed. Nor is it likely that the board would require to have the names of the subdistributors returned to them, but for the purpose of approving or rejecting them. They are likewise answerable to government for the money they collect, as well as to the distributor. Under these circumstances it cannot be doubted, whether they are subject to the influence of government.

The words of the act, "person employed in collecting, &c." directly include the voter. If any argument can possibly arise upon the words, it can only be from the redundancy of the expression following, in which persons *appointed by the Commissioners* are particularly described; as if the situation of persons in this and the former description were different. The latter part of this clause was perhaps unnecessary; however it can only have been inserted from extreme caution: And it would be most absurd to turn it to an effect directly contrary to the plain intent; which is so pointed and strong in the first words, as to require no observation.

If

If this clause were construed not to extend to Disqual. this class of persons, the effect of it would be ^{Office.} very trifling. It would only disqualify one per- J. Arch. son in each county, viz. the distributor; and even this might be rendered nugatory. For if the Commissioners should choose to defeat the act, they need only appoint one distributor for the whole kingdom, who by appointing all others in his own name as subdistributors, would in this case exempt them from the intended disqualification.

The following arguments were used on the other side.

Laws introducing penalties, are to be construed strictly; and any doubtful expressions in them are to be construed favourably to the party. If the Committee should decide the voter to be disqualified, their decision may involve him in an action for the 50l. penalty, which the statute inflicts upon any disqualified person's voting. It is therefore a question of great importance to the voter, which the court ought to determine upon the same principles as they would follow, if they were a jury trying an action against him for the penalty.

It is not proved that the voter's situation renders him dependent on government, for the appointment is independent of it. The distributor himself appoints whom he pleases; the profit

Disqual. profit arises from the contract made with him
Office. alone. He receives no orders or instructions

J. Arch. whatever from the Commissioners, and has no communication with them. Nor is he, as has been asserted on the other side, answerable to the crown if he fails in his payments; but to the distributor: Although the latter might issue an extent *in aid* against him in such case, because the distributor is debtor to the crown. But this proves the subdistributor to be debtor to the other, and not to the crown. If all persons who may be indirectly liable to some of the influence of government, are to be excluded from voting by the construction of this act, it would extend to an infinite variety of connections, and might embrace half the nation; whereas the act describes only certain direct dependencies.

It is said, the statute is pointed and strong for the disqualification; but a closer examination of them shews it otherwise: For if the class of persons mentioned as appointed by the Commissioners, are not different from those before described in the general words, why were those words added? The act therefore must be supposed to distinguish persons appointed by the Commissioners, from those who are not so, by framing a particular exclusion for them; and in this it controlls the preceding general words, which may well be supposed to mean such only as are appointed

appointed receivers of the duty. These general words may be charged with uncertainty, with as ^{Disqual. Office.} good reason as the other words have been J. Arch. charged by the opposite counsel with redundancy. It is plain, that the distributors themselves (who are appointed by the Commissioners) were not thought to be included in the first general words; by the addition of the second sentence to take them in. But a subdistributor of stamps is not appointed by the Commissioners, and therefore not within this clause.

In the above sense, the Buckinghamshire Committee * have received this clause of the act, and have allowed the vote to be good; their decision may be considered as a precedent in this case.

The case put of the possibility of one distributor being appointed for the kingdom, is such an extreme case as can hardly be supposed. It could not take place without drawing down a parliamentary punishment upon the Commissioners who should attempt it.

GOOD.

[The above objection was made by the petitioner in the case of Buckinghamshire, and re-

* Their decision passed on the last day of the trial, the 11th of April. The above arguments were delivered here in the week following,

ceived

Disqual. Office. received the same determination there. It arose and was argued in the case of Cricklade, but was not determined in that cause.]

Rev. John Hempsted —objected to as husband to the post-mistress of Newmarket. She was appointed to the office in the usual form of deputation in 1778, and married the voter in 1781.

The words of the disqualifying act, 22 Geo. III. ch. 41. relating to this question are these, "Any post-master, post-masters general, or his or their deputy or deputies, or any person employed by or under him or them, in receiving, collecting, or managing the revenue of the Post-office, or any part thereof."

It was contended, that the voter was disqualified, upon the following reasons, viz.

The husband and wife are in law considered as the same person; her property becomes the husband's so completely, that she cannot grant any thing to him. She is not allowed to give evidence for or against him, upon the same principle. If the office in question is beneficial, the whole profit of it is the husband's; whatever money is paid to her for it, he has a right to; and can insist upon payment to himself, if he pleases. He is also liable to actions for any default of hers, and the security for her due discharge of the office, must be given in his name.

This

This is like the case of an office held in trust for another; in which case there would be no doubt that the *Cestui que trust* would be disqualified under this act, though the office were nominally in another person.

Disqual.
Office.
Rev. John
Hempted

But if the rule of law were not so clear upon this point, a just consideration of the spirit and design of this statute, would lead to the same conclusion. For it cannot be doubted, that the influence of this profitable employment, whatever it be, affects the husband equally with the wife. The advantage results to him indirectly, but as effectually as if he held the place in his own person.

On the other side it was contended.

That the penal disabilities of this act were not to be extended by implication: That as the voter was not included in the express words of disqualification, it would be an unfavourable construction, and contrary to the usual mode of construing penal laws, to include him in it indirectly, when so heavy a penalty would be thereby adjudged to have been incurred. That if it were a question at law on a trial for the penalty, the voter would have a verdict; for the plaintiff in the action would not be able to prove *his acting* in the office, from which acting the penalty arises: And in this case the right to vote, and the not incurring the penalty, are convertible terms.

That

Disqual-
Office.

Rev. John
Hempsted

That it was plain, likewise, that the act extended only to persons who could resign the disqualifying offices; but the voter could not resign his wife's appointment, if he were so inclined; nor could he compel her to resign it.

That the legal state of the connection between husband and wife, did not affect the connection subsisting between the Post-office and its deputy the voter's wife; for at the office she was considered as the person responsible; and, no doubt, any misconduct on her part, without the default of her husband, would occasion her being dismissed.

That the persons intended to be disqualified by the act, were those in the employment of the different offices; and the proper rule to follow would be to trace the different classes of officers there specified, which were extended enough; for it would be endless to follow the train of influence under government through all its communications.

That there could be no pretence here for supposing the appointment of the wife was only nominal, or for the purpose of covering a disqualification; since she had held the office and executed the duties of it, before her marriage with the voter.

BAD.

Thomas

Thomas Godfrey Burr, objected to as post-master at Luton. The voter held the office under the regular appointment, but it was executed by John Smith an inn-keeper there, who by Burr's agreement received the salary for his own use. The correspondence with the post-office in London, was carried on in Burr's name, and orders from thence were sent to *him*; not to Smith. The voter was a brewer, and Smith rented the inn and some land of him. The latter swore, that he gave no consideration for the profits of the office to Burr; but when he took the inn of him, he expected to have the office with it.

The counsel against the vote contended, That the agreement between the voter and Smith did not affect his disqualification by the statute, as a person acting under the Post-office appointment; because there was no room for saying, that the former held the office in trust for the latter, and derived no benefit from it to himself: That Smith was to be considered as his servant, and paid by him, he being the real officer: That the rent of his inn was certainly raised, and the consumption of his beer increased by the business being carried on in this manner; and by this means he gained considerable benefit from the office, though indirectly: That if it were not so, Burr would not continue to hold a very responsible

Disqual. station, in which he ran great risks upon the ca-
Office. } fual negligence of others.

T.G.Burr On the other side it was said, That consistently with the decision in Hempsted's case, this voter might well be allowed; because he did not enjoy the *real* benefit of the office, but held it merely by name: That the voter's connection with the Post-office was a charge, not a benefit; for he was liable to answer for all defaults, while another received the profits: That this circumstance distinguished the case out of the statute; for the influence of government which it was made to restrain, could not extend to offices not profitable to the holders.

BAD.

Ja. Wilson—objected to as a person employed in collecting the revenues of the Post-office. He was appointed by the postmaster at Luton to distribute the letters and receive the postage, for the parish of Barton, which is within the Luton district and not a post town of itself; for which he received for his own profit, a penny a mile upon each letter, above the office postage received for his principal. Persons in this situation are called at the Post-office sub-deputies, and are generally appointed with the approbation of the postmaster general, though not by him.

him. There was nothing in the books of the ^{Disqual.} Post-office relating to the voter's appointment. ^{Office.}

It was said in support of the vote, That the ^{J. Wilson.} appointment being unconnected with the Post-office, made merely for the convenience of the inhabitants of the parish, and not paid for by government but by the parishioners, it ought not, upon a liberal construction of the act, to be considered as a disqualification.

Good.

John Houghland was objected to, as having ^{Receipt of} received parish alms within a year before the ^{Alms.} election. ^{J. Houghland.}

In support of the objection it was said, That if it held against voters in boroughs, it ought to hold *a fortiori* in counties, where the right of voting is to be derived from property, and not as it is in many boroughs, from a personal right independent of any property. Though there is no express resolution to be found in the Journals, applying to counties in particular, yet it has been always understood to be equally an objection in them as in boroughs; as appears from the state of the Essex case in 1716, 17 May, 18 Journ. 447, where it is treated as a known ground of objection. The Cricklade Committee had but a few days before received it as such,

Receipt of and passed a direct resolution in confirmation of Alms. it *. Their authority has made it *res judicata*.

J. Houghland.

On the other side it was said, That the reason for considering the receipt of alms as a disqualification in boroughs, was because of the person's thereby becoming a dependent member of society, without property to maintain him; that in such case it was a *personal* disqualification from exercising a *personal* right: But that in counties, a freeholder's possessing forty shillings a year, was the only necessary qualification; and while this remains with him, the law would not suppose him in a state of indigence. That it ought rather to be presumed that his receipt of alms was only accidental; because, the parish need not have relieved him if he refused to give them up his property, which they might have required from him; and their suffering him to retain it, argued that he was not considered by them as one of the ordinary poor.

The Committee held the vote good. The following motion,

That parish alms paid to a freeholder do invalidate his vote, although he continues in possession of a freehold of the clear yearly value of forty shillings,

Passed in the negative †.

Charles

* See their resolution, next after the following case of C. Myers.

† Not only in the case of Essex abovementioned, (the parti-

Charles Myers. In this case a dispute arose ^{Receipt of} between the counsel upon the meaning of the re-^{Alms.} solution above stated, which the Committee ex-^{C. Myers.} plained to mean, "that parish relief made no disqualification, while the voter retained the possession of his freehold."

The objections stated against this voter were, That he had no freehold, none of the value of forty shillings, and received parish relief; and the petitioner's counsel wanted to give evidence, that the voter was out of the possession of his

particulars of which are recited in note (F.) but likewise in that of Oxfordshire, (27 Journ. 202, 232.) the receipt of alms is treated as a known objection. In the Yorkshire petition in 22 Journ. 499, 500, it is also named among the objections; though the petitioner does not seem to have brought evidence in support of it. In the Gloucestershire case it is reckoned in the list of those whom the petitioner had disqualified, and was likewise made use of by the sitting member; although in another part of the cause the competence of it was denied on his part; but this was in the case of a particular *charity*, as distinguished from parish relief. And it is with reference to such cases, that I should understand the Chairman's observation in his book, in which he treats the question as *undecided*. For otherwise that is inconsistent with one of the resolutions of that Committee, in which, after argument, they permitted evidence to be given of the receipt of parish relief, in order to disqualify a voter; thereby plainly deciding the question. See p. 84, 125, 178, 179, 180, of the Resolves of that Committee; in the last of which, the Chairman adds a N. B. that the case of *parish poor* was not argued.

Receipt of estate for a year before the election. The other
Alms.

counsel objected to this, because that was a dis-
 C. Myers. tinct specific head of objection of itself, which
 was not stated in the lists, and therefore evidence
 of it ought not to be received; that the objec-
 tion of parish relief, being in itself held by the
 Committee not to affect the vote, it should be
 considered as not having been stated; and in that
 case the evidence offered was irrelevant to the
 objections that were stated.

To this it was answered, That the objection
 of alms could not be made out, according to the
 decision of the Committee, but in this way; and
 therefore it must necessarily be received as com-
 petent upon the cause of objection stated.

The Committee declared an opinion for re-
 ceiving the evidence offered *.

It appeared that the voter received parish re-
 lief, but was in possession of his estate, from
 which he derived forty shillings a year; in conse-
 quence of which, the parish allowed him so much
 less than he would have otherwise received from
 them of relief. From hence the counsel against
 the vote argued, that the voter did not receive
 the rent as owner, for his own use; but really,
 for the benefit of the parish and as agent to them.
 But the Committee seemed to think the fact too

* See the case in p. 532, 3.

plain,

plain, and that the voter was not disqualified Receipt of
 within the terms of their resolution; and here-^{Alms.}
 upon the counsel did not press the objection to C. Myers.
 the vote, which the Committee afterwards al-
 lowed to be good.

[In the case of Cricklade, the Committee Cricklade,
 were of a different opinion. The question arose
 upon the vote of Robert Strange a freeholder
 of Highworth, upon which they came to the
 following resolution:

*That Robert Strange having within twelve
 months before the election received parish relief, was
 thereby disqualified from voting.]*

An objection was made to the vote of William Ideocy.
 Burgefs, that he was an idiot; but according W Burgefs
 to the state of the evidence in support of it, the
 fact was not sufficiently established, and the ob-
 jection failed *.

The petitioner objected to a voter that he was Papist.
 a Papist. The counsel for the sitting member
 said, this furnished no ground for objection;
 that the voter had taken all the oaths required
 of him at the poll, and if the other party had
 thought proper at the election, they might then

* In the Oxfordshire case there was an objection to a voter
 as being insane, and so disordered in his senses that he could
 not repeat the oaths. 27 Journ. 176.

have tendered the oath of abjuration to him; which was the only trial they could make of his religion, and at that time only. The court seemed to be of this opinion, and no more was said upon the subject.

Evidence. In the first part of the trial there were frequent disputes upon evidence, but they were in general too complicated to be stated here, as regular legal questions. In those cases in which the contents of deeds were necessary to support an objection, it soon became an established rule, that no evidence of it should be received, unless notice had been served upon the party to produce the deeds. The Committee passed an express resolution to this effect in the case of Richard Matson. Neither would they lend their assistance to the parties, in order to *compel* a production of deeds to invalidate the title of a voter. Some subpoenas having been signed by the Chairman to witnesses *to produce deeds*, in the beginning of the trial, (which had passed as a matter of course, and this particular effect of them unobserved) were recalled by him as soon as the purport of them was known.

At the end of the cause, during the trial of the tendered and rejected votes on Lord Ongley's

side, his counsel had proved their case as to one Evidence. of them, John Hunt; which the petitioner proposed to answer, by proving from the *voter's own declarations*, that the tender had been improperly made, and was therefore void. It was argued against this, That the evidence of his declarations was improper in the question of tender; because he might be examined himself to prove the fact; not being interested in that, as he is with respect to his *right* to vote; and therefore what he had been heard to say upon it was not the best evidence, as the court might hear it from himself, if those who wanted the evidence should choose to call him before them.

It was replied, That the distinction between the right to vote, and the right to be on the poll, had no real difference as to this question of interest, if there were any such *; that if a voter's declaration were admissible against his right, it ought upon the same principle to be equally admissible against his tender to vote.

The court did not decide this question of evidence; but the counsel for the petitioner waved the point on their side, and called the voter himself, who was examined upon the particulars of his tender at the poll.

* See the case of the King and Bray, cited in vol. i. p. 389, from Hardw. Rep. 358.

N O T E S

ON THE CASE OF THE COUNTY OF

BEDFORD,

In 1785.

PAGE 382. (A.) The resolution here alluded to, was first made in the beginning of the session which commenced in January 1735-6, and was occasioned by the petition on the Yorkshire election then presented. It passed after a debate, in which twenty different questions of amendments had been put upon it; after which the resolution stood as follows:

Resolved, That in all cases of controverted elections for counties in England and Wales, *to be heard at the bar of this House, or before the Committee of privileges and elections*, the petitioners do by themselves or their agents, within a convenient time to be appointed either by the House, or the Committee of privileges and elections, as the matter to be heard shall be before the House or the said Committee, deliver to the sitting members, or their agents, &c. (as in the order stated in p. 382.) See 22 Journ. 501.

Since the year 1736, the above resolution has been annually passed among the other annual resolutions; except that when the present institution for trying elections

elections took place in 1770, an alteration was made by omitting from it the words before-mentioned in *Italic*, which related to the abolished mode of trial*.

The original design of this resolution was to empower those who were to try the election, to regulate the delivery of the lists; but it was impossible, from the nature of the institution, to transfer this power to the new election court; and therefore the House wisely reserved it to themselves; though it is, in some measure, an incroachment upon the jurisdiction of the new tribunal. It is warranted by its justice and propriety, tending so much to facilitate the proceedings on the trial, that it is to be wished (as I have before, in the preface to Vol. I. observed) that the same regulation were to take place in all numerous elections, as well in boroughs as counties.

It appears by the Journal of the 29th of Nov. 1699, 13 Journ. 9, that the election committee of that period had made some order like this, of their own authority, but the particulars are not stated; the entry is as follows: "A debate arising in the House concerning certain orders lately made by the Committee of privileges and elections, relating to the giving of lists of persons excepted to on either side, in cases touching elections depending before them; and the House considering the inconveniencies that have arisen thereby,

Ordered, "That the said orders be discharged: And that it be an instruction to the said Committee, That they do make no such orders for the future." This entry leaves us at a loss to discover what the incon-

* See 33 Journ. 6.

veniencies complained of were; perhaps they arose more from the practice of the court than from the regulation itself.

The only instance in which I have found the delivery of lists in a county election, required by the House previous to 1736, is in the case of Rutlandshire in January 1710-11; when, upon the second day of hearing that election at the bar of the House, the House of its own accord required lists from the *sitting member* of such voters as he intended to object to, or to have added to his own. It is said in the Journal (16 Journ. 461) to have been "moved and acquiesced in as the sense of the House." But these lists were delivered *to the House*, not to the other party. "Afterwards Mr. Speaker desired to know the pleasure of the House, whether the clerk might give copies of those lists to the petitioner: Which the House acquiesced in that he might do." It does not appear that the sitting member made any objection to this proceeding; and probably it was occasioned by a voluntary delivery of lists on the part of the petitioner, in the first instance.

The Committee upon the Southwark election in 1785, in the beginning of the same month of March in which this trial began, took the like course of proceeding. The borough of Southwark consists of five parishes, and the number of voters is very great. The petitioner's counsel, in opening the case, proposed to proceed by separate parishes, (as afterwards practised in Bedfordshire by hundreds,) and to exchange lists of objections with the sitting member as in counties; and they began with the parish of St. John. The sitting member's counsel agreed to the mode of proceeding, and to the proposal of exchanging lists;
but

but proposed that the lists should not be delivered on their part till the petitioner's objections in the parish should be finished. Hereupon the court passed the two following resolutions unanimously.

1. *That the Committee approve of the plan proposed and agreed on by the counsel on both sides, of determining the merits of the votes in each parish on both sides, before they proceed to any other parish.*

2. *That the counsel on both sides be directed mutually to exchange lists of all the votes they mean to object to, in the parish of St. John, on or before Monday next the 7th of this instant March: And that they do proceed in the impeachment of the votes in the order in which they are mentioned in the said lists; unless by leave of the Committee to proceed otherwise.*

The above resolutions passed on Friday, March 4, the first sitting of the Committee. The petitioner declined before his objections in the parish of St. John were finished, on the 28th of the same month.

In the preface to my first volume, (p. 30) a case is mentioned of a borough election, tried in 1714, in which the House ordered an exchange of lists of objections; which, it is much to be wished, were established by authority, as a general regulation for all populous elections.

P. 382. (B.) The following are copies of the forms of the lists exchanged between the parties, parts of which I recite, in order to shew the manner of drawing them up. The petitioner's was thus:

" BEDFORDSHIRE.

A List of Voters for Lord ONGLEY, objected to by
Mr. ST. JOHN.

MANSHEAD HUNDRED.

Freeholder.	Place of Abode.	Where the Estates are situate, in right of which the pretended Votes were given, or supposed to be given.	Objections.
Timothy Deacon.	Eversholt	Eversholt	No freehold. Not worth 40s. a year. Not conveyed to the voter 12 months before the election. No possession 12 months before the election. No freehold as described on the poll.
Thomas Meacher.	Ivinghoe	Eaton Bray	Not assessed to the land tax. Not 40s. a year clear of all rents and charges. No freehold. No freehold as described on the poll.
Ja. Smith		Harlington	No freehold. Not assessed to the land tax. Not 40s. a year clear of all rents and charges. No freehold as described on the poll.

Benjamin

Freeholder.	Place of Abode.	Where the Estates are situate, in right of which the pretended Votes were given, or supposed to be given.	Objections.
Benjamin Seare	Heath and Beach	Heath & Beach	Not 40s. a year clear of all rents and charges. Mortgaged, or otherwise incumbered, No freehold. No freehold as described on the poll.
Thomas Cook	Great Gatts, Herts	Houghton Regis	Not assessed to the land tax. No freehold. No freehold as described on the poll.
Ja. Cocks, Esq.	Cleveland Row, St. James's.	Houghton Regis	Not assessed to the land tax. Not conveyed to the voter 12 months before the election. No freehold. Not in possession 12 months. No freehold as described on the poll.
John Mil-lard	Leighton	Leighton	Not assessed to the land tax. No freehold as described on the poll.
To be added to Mr. St. John's poll. (See p. 390)	{ Henry Horton of Tottenhoe Wm. Bennett of Apsley Guise. Samuel Groom of Wingfield. Wm. Morris of Westoning. }		Voted for Mr. St. John, and omitted to be taken down on the poll. Tendered their votes for Mr. St. John, and were improperly rejected.

FLITT HUNDRED.

Freeholder.	Place of Abode.	Where the Estates are situate, in right of which the pretended Votes were given, or supposed to be given.	Objections.
James Wilfon	Barton	Barton	Not assesse'd to the land tax. Deputy postmaster. Employed under the postmasters general in collecting or managing the revenues of the post-office, or some part thereof.
Thomas Wildman	Flitton	Flitton	Not assesse'd to the land tax. No freehold. Not 40s. a year clear of rents and charges. No freehold as stated on the poll. Did not vote.
Daniel Palmer	Flitton	Flitton	No certificate of rent charge or annuity entered, or the memorial thereof registered with the clerk of the peace. No freehold. Not assesse'd to the land tax. Not 40s. a year clear of rents and charges. No freehold as stated on the poll.
Henry Eggers	London	Luton.	A foreigner. No freehold. No freehold as stated on the poll.

Lord

Lord ONGLEY's List was in the Form following.

MANSHEAD HUNDRED. N^o I. Parish of Eversholt.

OBJECTIONS.

- | | |
|--------------------|---|
| 1. Thomas Mayes | Having no such estate as described on the poll, or having no freehold in the occupation of the tenant named on the poll, or the estate voted for not duly assessed to the land tax. |
| 2. John Butcher | Employed in collecting the duties on windows and houses. |
| 7. William Bullock | The estate voted for not duly assessed to the land tax. |

Parish of EGGINGTON.

- | | |
|-----------------|---|
| 9. Samuel Marks | Having no freehold in the estate voted for, or having no freehold in such estate of the yearly value of 40s. according to the statutes. |
|-----------------|---|

Hamlet of BILLINGTON.

- | | |
|------------------------|--|
| 10. Patrick Macfarlane | Having no such estate as described on the poll, or the estate voted for not duly assessed to the land tax. |
|------------------------|--|

Lord Ongley's list of each hundred was numbered, and in this respect more convenient for use. He did not state the objection of *mortgage* in his list, not expecting it to be proceeded on; but after the court had allowed the competence of the objection, his counsel proceeded upon it, where they thought proper, under the objection to the value as stated above against N^o 9, which was not opposed by the petitioner. The consequences of his not having included the rejected votes in his list, have been already related. See p. 390—394.

P. 396. (C.) This act entirely changes the system of county elections, by introducing a register of freeholders in every county, subdivided according to the parochial districts of the land tax collection; for each of which there is to be a particular register, under the care of the collectors of the land tax, who are hereby appointed register keepers. They are directed to inroll the names of all freeholders, who make application for the purpose in the manner prescribed; and no freeholder is to be permitted to vote at a county election after the 10th of July 1790, whose name shall not have been so registered for twelve months before; except in the usual cases excepted, under certain regulations.

There are several minute provisions for regulating and preserving the inrollments, copies of which are to be delivered upon oath to the clerks of the peace in January and July in every year, who are to keep them for use and inspection. These registers are to be absolute and conclusive upon the right of voting in every respect: And when this law shall take place, the assessment act of 20 Geo. III. together with such parts of 18 Geo. II. ch. 18. as direct the assessment of voters, and the sheriff's and freeholder's oaths at elections are to be repealed. But the registration of annuities and rentcharges according to 3 Geo. III. ch. 24. is continued.

As it is said, that this act is to undergo a revision in the course of the present session, in consequence of the petitions that have been presented against it, I forbear to enter more particularly upon the consideration of it.

P. 434, 436. (D.) The opinion of Lord Mansfield on this subject, delivered in the House of Lords, in the case of the Chamberlain of London and Evans, Feb. 4, 1767, which brought the effect of the Toleration act directly into question, is in these words: "It has been said (*alluding to the contrary opinion of Baron Perrott*) that the Toleration act amounts only to an exemption of protestant dissenters from the penalties of certain laws therein particularly mentioned, and to nothing more; that if it had been intended to bear and to have any operation upon the Corporation act, the Corporation act ought to have been mentioned therein; and there ought to have been some enacting clause exempting dissenters from prosecution in consequence of this act, and enabling them to plead their not having received the sacrament according to the rites of the Church of England, in bar of such action. But this is much too limited and narrow a conception of the Toleration act, which amounts consequentially to a great deal more than this, and it has consequentially an influence and operation on the Corporation act in particular. The Toleration act renders that which was illegal before, now legal; the dissenters' way of worship is permitted and allowed by this act; it is not only exempted from punishment, but rendered innocent and lawful: It is *established*: It is put under the protection, and is not merely under the connivance of the law."

I have taken the above passage from the copy of Lord Mansfield's speech, printed by Dr. Furneaux in the appendix to his letters to Mr. Justice Blackstone; which he published after his lordship's perusal and approbation of the manuscript. There is reason

to think, that the word *established* was used emphatically by Lord Mansfield on this occasion, with a view to its common application to the establishment of our national church; according to the following passage in Dr. Furneaux's first letter. He says in p. 24. "When the late incomparable speaker of the House of Commons, Mr. Onslow, was informed of the expression which the learned and noble lord used on this occasion, he observed in a conversation with which he honoured me, that this was the language he himself had always held; that, as far as the authority of the law could go in point of protection, the Dissenters were as truly established as the Church of England; and that an established church, as distinguished from their places of worship, was properly speaking, only an *endowed* church; a church which the law not only protected, but endowed with temporalities for its peculiar support and encouragement."

P. 442. (E.) The following is a copy of my own note of this case of Lawton and Lawton. "In a building descended to the heir, were four salt pans, erected by the ancestor for a brine work; made of iron and fixed on the ground in two pieces of brick work, separated from the walls of the building by a path. The building was of little value without them, but now was let for 8*l.* a week. The administrator claimed them of the heir by this action. Lord Mansfield, in giving judgment, said, "All the old cases upon this subject are in favour of the heir; even pictures in the wainscot, furnaces and other conveniencies not inseparably fixed to the freehold, have been held to go to the heir. But this rule has been relaxed in modern times

in

in two cases: First, between a landlord and tenant, out of regard to the interests of trade and improvement; thus, marble chimney-pieces put up by a tenant may be taken away at the end of the term; because the estate is still returned to the lessor in the same state as when granted out. Secondly, between a tenant for life, &c. and the reversioner; as, if the former erects a fire engine and dies, his executor may remove it, upon the same principle; and this applies to every moveable improvement, the loss of which leaves the estate *in statu quo*. But as between the heir and executor we find no such relaxation of the law, for this principle does not apply to that case. In the present case, the land is so far from being left *in statu quo*, if the pans are removed, that its value is gone; for the building was erected for the work. A salt-brine work, in that country (*Cheshire*) is a valuable inheritance; but it would be unprofitable without the pans. The person erecting them can have no contemplation of giving them to his executor, as a separate moveable. He would be at great expence in removing them, and the value would be thereby much diminished; so that he would only have a power of laying the inheritance under contribution. They ought therefore to belong to the heir: But it would have been different as between a tenant and the reversioner; for the latter, who is benefitted by a removeable improvement of this sort, ought in justice to purchase it."

P. 456, 7. (F.) I have looked over the accounts contained in the Journals of some other county elections, besides those particularly mentioned here, without finding any instance of an objection of Value re-

duced by a mortgage. But in the Oxfordshire case, there is one that bears a resemblance to it; more especially to the circumstances of the case, as it was argued before the Cricklade Committee. The entry of it in the Journal, vol. xxvii. p. 63, is thus: "The counsel for Lord Wenman and Sir James Dashwood having examined a witness, in order to disqualify Charles Dent, who voted for the said Lord Parker and Sir Edward Turner, as *not having a freehold in the said county, of the value of 40s. per annum.* And the probate of the will of Richard Dent being produced, in order to prove to whom, and *subject to what charges,* part of the estate claimed by the said Charles Dent was devised. And a witness having been examined in order to prove, that another person is in possession of part of the said estate. And the said witness being withdrawn, it was proposed that the said probate should be read." (*Upon which there follows a question upon the admission of the probate in evidence. Afterwards in p. 146, when the counsel on the other side come to requalify this vote, the entry is as follows:*)

"And they having proposed to establish the vote of Charles Dent, who voted for the said Lord Parker and Sir Edward Turner, and whom the counsel on the other side had endeavoured to disqualify, as not having a freehold in the said county of the value of 40s. per annum; in support of which objection, they had produced evidence, in order to prove that the estate for which the said Charles Dent claimed to vote, was charged with the payment of several such sums of money, as reduced the value of the said estate to less than 40s. per annum.

The

The counsel for the said Lord Parker and Sir Edward Turner, examined a witness in order to prove that one of the sums of money so alledged to be charged upon the said estate, had been paid to the person intitled thereto. And the said counsel having called another witness, in order to prove the payment of several other of the said sums of money, to the several persons respectively intitled thereto: And the said witness having offered to produce a paper, purporting to be a receipt from Anne Dent, for the sum of money to which she was intitled, and which was alledged to have been charged upon the said estate: The counsel on the other side objected to the said paper's being admitted to be read, as evidence of payment of the said money. (*Then follows an argument and question on the admissibility of the evidence, which being decided, the Journal proceeds.*)

Then the said paper was produced and read: And the same witness was examined, and produced evidence in relation to the payment of two other of the said sums of money charged upon the said estate, to the persons respectively intitled thereto, and in relation to the times of the payment of the said sums respectively. And another witness was examined, in order to prove the payment of the remaining sum, alledged to have been charged upon the said estate, to the person intitled to the said sum, and in relation to the time when it was paid."

The above extract contains all the evidence relating to this vote. The reader may have observed, that it was offered under the general objection stated in the list, of *not having a freehold in the said county of the value of 40s. per annum.* So that an objection of mortgage

may have been brought forward in election trials under that objection, without an exprefs one containing the word; although from the prevailing opinion, and the silence of the Journals respecting it, the contrary is more probable. In Dent's case the counsel defend the vote, by denying the charge as a matter of fact, seeming to admit the legal effect of it; which is a case in point to the argument maintained on one side in the Cricklade question.

As the three elections mentioned in the argument to which this note refers, were the most obstinately contested of any upon record, the reader may be pleased with comparing together the general statements of the objections made in them. That of Essex in 1716, was tried before the Committee of Privileges and Elections, and is reported to the House by the Chairman, as follows in 18 Journ. 447.

“ Mr. Hampden, according to order, reported, &c. That the Committee have examined the merits of that election.

That the poll was,

For Mr. Harvey,	—	2,541
Mr. Honeywood,	—	2,517

That the petitioner's counsel added three to his poll, viz. one who voted for the petitioner, and was put down for the sitting member; another voted for the petitioner, and was put down for Mr. Middleton, who was dead; another was undercast in the petitioner's poll.

And they objected to 157 of the sitting member's voters; and produced evidence, who disqualified 142 under the following heads, viz.

One a mortgagor out of possession;

Two

Two voted for reversions ; and
 Six for leaseholds ;
 Six purchased within a year before the election ;
 Seven were minors ;
 Seven were vicars, and four schoolmasters, not rated ;
 Twenty-one had no freeholds ;
 Eight had freeholds under value, and were not
 rated ; and

Eighty were in none of the public rates.

The other fifteen who were objected to, were not
 disqualified by the evidence which was offered against
 them.

That the sitting member's counsel objected to 251
 of the petitioner's voters ; and produced evidence,
 who disqualified 112, under the following heads, viz.

One a mortgagor out of possession ;
 One a schoolmaster not rated ;
 Two purchased within a year before the election ;
 Two were minors ;
Four received charity ;
 Fourteen had freeholds rated under value ;
 Four had freeholds, proved by witnesses, to be un-
 der value ;

Twenty-two had no freeholds ; and
 Sixty-two were in none of the public rates.

As to 117 other persons, objected to by the sitting
 member's counsel, the evidence was as follows :

Sixty-four were objected to, as not rated, viz. (*and
 then it states the evidence.*)

Fifty-three others were objected to, as not being
 in any rate.

That the sitting member's objections to twenty-
 two others were not proved.

To

To qualify forty-two of the sitting member's voters, it was insisted on by the counsel,

That thirteen were good votes, though not rated, viz.

Five vicars, four parsons, and four schoolmasters :

Two were proved to have freeholds of value, and twenty-seven were proved to be rated in their own or tenant's names ; which answered the objections that had been made to them.

That the petitioner's counsel, on their reply, alledged, That six which had been disqualified, as not having freeholds, or not rated in any rates, were only misnomers upon the poll, by literal mistakes of the clerks ; such as Bilsdon for *Pilsdon*, Stoke for *Stuck*, &c. And,

They proved by the rates, That fourteen were rated ; the contrary of which had been averred by the sitting member's witnesses, who inspected those rates.

Thus the petitioner's counsel qualified those 14, and falsified several of the sitting member's witnesses.

And that upon the whole matter, &c." Then follow resolutions for seating the petitioner.

The Yorkshire election in 1736, was tried at the bar of the house. At the conclusion of the petitioner's case, the entry in the Journal (22 Journ. 696) states the general account of it, from the summing up of the counsel thus :

" The counsel for the petitioner * * * summed up their evidence ; by which they alledged, That they had disqualified several persons as *not being assessed* to the public taxes, church rates and parish duties.—Others, as *having no freehold in the place where they swore that their freeholds did lie*, and of them, several as *having*

no estate at all—As being Schoolmasters—Parish Clerks—Curates—Hospital-men—Leaseholders, and Copyholders—Others, as not having freeholds of the value of 40s. per annum—as being Minors—as having purchased their freeholds within one year before the election—as having been influenced to vote by threats—as having voted twice—one as being an Alien; and others whose votes appear upon the poll, though there are no such persons, either in the places where they swore their freeholds did lie, or in the places where they swore that their abode was.”

The trial did not proceed to more than one day of the sitting member's case; and there is no general state of the objections on his part.

The Oxfordshire election in 1755, seems to have made the most obstinate contest of them all. That too was heard at the bar of the house, and continued from the 3d of December to the 23d of April following, during which time it was heard before the house 45 times. I have read all the entries of the proceedings in the Journal (vol. 27.) There is none that contains a general account of the objections on either side, as in the Yorkshire case. They are dispersed through the proceedings of the several days: But there were more heads of objection taken than in the latter. The case of Dent abovementioned is the only one which states a charge upon the estate, in objection to the vote.

Upon comparing these elections with that of Bedfordshire, it will appear, that the objections raised upon the assessments are vastly more numerous, in proportion to the numbers on the poll, in the latter case than in them.

P. 461, 2. (G.) The case of Wetherell and Hall, was an action of debt on the stat. 22 & 23 Charles II. ch. 25. for the penalty inflicted by that act on those who kill game, not having the estate therein described. It was tried at the Durham assizes in the summer of 1782, when the circumstances upon which the defendant rested his defence, having occasioned doubts in the court, it was agreed to state them in a special case for the opinion of the court of King's Bench in the following Michaelmas Term. This case stated, that the defendant, in right of his wife, was seised of an estate of inheritance, part copyhold, of the clear yearly value of 103l. That in May 1780, before the time of the supposed offence, the defendant and his wife mortgaged a close of the value of 14l. per ann. part of the said copyhold. That the said mortgagee was admitted to the said mortgaged part, but had never been in possession; the interest of the mortgage (which was for 400l.) having been regularly paid: And that at the time of the supposed offence, the said mortgage continued on the said close.

The counsel for the plaintiff argued, That the defendant had nothing more than an equitable estate, of which the court of King's Bench cannot take notice. It must be of an inheritable nature. The defendant must be the proprietor: Here he is only tenant at will. But, further, on a fair construction of the above act, the defendant is not qualified. The legislature meant persons of a certain independent income, by the words "*clear yearly value*." In case he had taken it subject to the mortgage, instead of mortgaging it himself, or suppose the value reduced by taxes, in either case he has not the income described by the act; for
the

the gross value of an estate is not the measure of that.

The counsel for the defendant argued, That the only question made at the trial, and to be considered now was, whether the interest of the mortgage was to be considered as a deduction. There are many cases in which courts of law take notice of equitable interests, as in ejectments against *cestui que trust*. 2d, This is a penal act, and equitable estates are within it. An equity of redemption is considered as real estate; it descends to the heir of the mortgagor. A mortgage is only a debt.

The question remaining is, whether the interest can be any thing more than a debt. The words *clear annual value* relate only to the property, without any regard to the debts. The mortgagee, if in possession, might kill game, and the court would not inquire into the quantity of the debt or interest. The penalties of the law are to be determined by justices of peace, and it could not be intended that they should go into all the transactions and circumstances of the defendant's property. There are no cases on the subject, but some circumstances in the old qualification acts are in favour of this construction. In the stat. 1 James, ch. 27. s. 3. and 3 James, ch. 13. s. 5. a personal estate is one of the qualifications. No mention is there made of debts: The possession of chattels to the amount of £.200 is sufficient. In the qualification to vote by 7 & 8 W. III. ch. 25. a mortgagor in possession is to vote. By *incumbrances*, are meant cases in which some other person receives the rents.

Lord

Lord Mansfield—"The privilege is given to *property*. In the case of voting, a man *swears* to his having 40s. a year. The mortgagee has a charge on the land: It might be carried so far, as that the mortgagor might have nothing."

Judges Willes and Ashhurst were of the same opinion. Judge Buller was of the same opinion, and added—"As to the justices of peace, they *must* in many cases go into such inquiries; as on contracts between landlord and tenant. The only doubt is, whether *clear yearly value* means value in possession of the defendant. It is clear upon the words of the act that it does; and especially when the statute of James is considered."

Hereupon the court gave judgment for the plaintiff.

P. 478. (H.) The statute is as follows:

"An act to remove certain difficulties relative to voters at county elections."

"Whereas the several laws now in being, for ascertaining the rights of persons claiming to vote in the elections of knights of the shire to serve in parliament, for that part of Great Britain called England, are difficult to be carried into execution, and great delays and inconveniences have been occasioned by the numberless disputes which have arisen at county elections concerning such rights, for remedy whereof be it enacted, &c. That from and after the first day of January, 1781, &c. (*as in p. 477.*)

"Sect. 2. Provided always, That this act, with respect to such rating and assessing as aforesaid, shall not extend, or be construed to extend, to annuities or fee-farm rents, (duly registered) issuing out of any messuages,

messuages, lands, or tenements, rated or assessed as aforesaid; nor shall the same extend, or be construed to extend, to any person who became entitled to such messuages lands or tenements, for which he shall vote or claim to vote as aforesaid, by descent, marriage, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to an office, within twelve calendar months next before such election; but such person shall be entitled to vote at such election, if the messuages lands or tenements for which he shall vote or claim to vote, as aforesaid, have been, within two years next before such election, rated or assessed to the land tax, in the name of the person or persons by or through whom such person voting or claiming to vote as aforesaid, shall derive his title to the messuages lands or tenements for which he shall vote or claim to vote, as aforesaid, or in the name of some predecessor within two years next before such election, of such person claiming to vote in respect of any promotion to any benefice in a church, or promotion to an office, or in the name of the tenant or tenants of such person or persons, such tenant or tenants actually occupying such messuages lands or tenements.

“ Sect. 3. And be it further enacted, That the commissioners of the land tax for that part of Great Britain called England, or the principality of Wales, at their respective meetings held for appointing assessors of the land tax for the several parishes and places lying within the division for which such commissioners shall act, shall cause to be delivered to each of the said assessors, a printed form of an assessment, as set forth in the schedule hereunto annexed; and the said assessors are hereby

hereby required to make their assessments according to the said form ; and shall make three duplicates of such assessments ; and shall (at least fourteen days before such assessment shall be delivered to the commissioners of the land tax for the county riding or division, within which the parish or place for which such assessment shall be made shall lie) cause one of the said duplicates, or a fair copy thereof, to be stuck up upon one of the doors of the church or chapel of the parish or place for which such assessment shall be made ; but in case such assessment shall be made for an extraparo-chial or any other place where there is not any church or chapel, then such assessment shall be stuck up upon one of the doors of the church or chapel in a parish next adjoining ; and if any person or persons (renting, holding, or occupying, any messuages lands or tenements in any such parish or place,) shall rent, hold, or occupy, messuages lands or tenements, belonging to different owners or proprietors, the same shall be separately and distinctly rated and assessed in such assessments, that the proportion of the land tax to be paid by each separate owner or proprietor respectively, may be known and ascertained ; and the said duplicates shall be delivered to the land tax commissioners, at their meeting for the receipt of assessments ; and if the name of any owner or owners of any messuages, lands, or tenements, in such parish or place, entitled to vote as aforesaid, shall not appear or be included in such assessment, it shall and may be lawful for such person or persons, by himself or themselves or by his or their agent or agents, to appeal to the commissioners of the land tax, to whom such assessments shall be returned ; and every person so intending to appeal shall,

shall, and is hereby required to give notice thereof in writing to one or more of the assessors of the parish or place wherein he is rated: And the said commissioners, on sufficient cause to be shewn, shall amend the duplicates of such assessments, by inserting therein the name or names of the actual occupier or occupiers, and of the owner or owners of such messuages lands or tenements, or the person or persons entitled to, or in the actual receipt of the rents issues and profits thereof; or by erasing the name of any person who shall appear to them to have been improperly inserted therein. And the said commissioners are hereby required to cause one of the said duplicates so amended (after the same shall be duly signed and sealed by the said commissioners or any three of them) to be returned to the said assessors, or one of them; and such assessors are hereby required to deliver such duplicate, so amended, within ten days after the receipt thereof, to one of the chief constables of the hundred lath or wapentake, within which the parish or place for which such assessment was made shall lie, taking the receipt of such chief constable for the same, and which receipt such chief constable is hereby required to give: And such chief constable is hereby also required to deliver such duplicate upon oath, (which oath the said magistrates are hereby empowered to administer), without any alteration, at the next general quarter sessions of the peace for the county riding or division, within which such assessment shall be made, in open court, the first day of such sessions, to the clerk of the peace attending such sessions, to be by him filed and kept amongst the records of the sessions.

Sect. 4. And be it further enacted, That if any assessor shall neglect to deliver such duplicate so amended to such chief constable as aforesaid, or if such chief constable to whom the same shall be delivered, shall neglect to deliver the same to such clerk of the peace, at the next general quarter sessions of the peace as aforesaid, or shall wilfully alter or deface any such duplicate; every such assessor and chief constable so offending shall, for every such offence, and for every such duplicate so neglected to be delivered as aforesaid, forfeit the sum of five pounds, to be levied and recovered in the manner herein after mentioned."

In section 5, the clerk of the peace is directed, during every Michaelmas sessions, to examine whether all the land tax duplicates of the several divisions have been brought in; and if not, to report it to the court, who are to fine the chief constables so having made default.

In sect. 6, 7, and 8, a method is provided for punishing the assessors and discharging the chief constables, if it shall appear that the fault was in the former: And the fines are to be paid to the treasurer of the county.

In sect. 9, the justices (or any two) are empowered to order the assessment to be made, where omitted, and delivered to the clerk of the peace.

Sect. 10, is thus: "And be it further enacted, That if any person or persons shall be dissatisfied, or shall think himself or themselves aggrieved by any determination of the said commissioners of the land tax, it shall and may be lawful for such person or persons to appeal against such determination, to the general

quarter

quarter sessions of the peace for the county riding or division within which such commissioners shall act, which shall happen next after the cause of complaint shall have arisen, giving ten days notice of such appeal to one of the commissioners signing the duplicate of the said assessment, and also to one of the assessors of the parish or place where the estate belonging to the person or persons who shall think himself or themselves aggrieved shall lie: And the justices assembled in such sessions are hereby authorized and required by examination upon oath, (which oath the said justices are hereby authorized to administer,) to hear and determine the matter of such appeal, and to amend such assessments where they shall think necessary; and also to award such costs, as to them in their discretion shall seem reasonable; and by their order or warrant to levy the costs which shall be so awarded, by distress and sale of the goods and chattels of the person or persons against whom the same shall be so awarded, rendering the overplus (if any) to the owner or owners after deducting the reasonable charges of such distress."

In sect. 11, provision is made that persons whose names on appeal shall appear to have been improperly omitted from the rate, shall be deemed to have been duly rated.

Sect. 12, relates to husbands of women intitled to dower out of the estates of their former husbands, who are enabled to vote although the dower may not have been actually assigned.

Sect. 13, directs the clerks to give inspection and copies of the duplicates, on being paid as therein provided; " which said duplicates and also a true copy

of them or any part of them, signed as aforesaid; and also the duplicate of any assessment in the possession of the commissioners of the land tax, or in the possession of the receiver general of the county, or a copy of the said duplicates signed by the said commissioners, and purporting the same to be a true copy, shall at all times and in all places be allowed and admitted, as legal evidence of such assessments certificates memorials and books of entries, in all cases whatsoever: And such copy shall be delivered within a reasonable time after the same shall be demanded."

Sect. 14, directs the clerk of the peace or his deputy to attend at every county election with the original duplicates, at the request of any candidate; who is to pay him two guineas a day for attendance, and eighteen pence a mile for his travelling expences.

In sect. 15, That after notice of the issuing of the writ, the clerk of the peace is to attend from nine to three each day, where the records of the county are usually kept, for the purpose of making copies of the duplicates, &c.

Sect. 16, inflicts a penalty of 500*l.* on the clerk of the peace for wilful misbehaviour contrary to this act; the action to be brought within two months. And the remaining sections of the act regulate the proceedings for recovering the penalties, or indemnifying the parties concerned.

XIII.

THE

C A S E

Of the COUNTY of

B U C K I N G H A M.

The Committee was chosen on Monday, April 4,
1785, and consisted of the following Members:

Edward Phelps, Esq; *Chairman.*
Daniel Pultney, Esq;
Hon. Ed. James Eliot,
John Call, Esq;
Sir Charles Preston.
Hon. John Eliot.
Sir John Miller, Bart.
Robert Colt, Esq;
John M^cNamara, Esq;
Sir Charles Kent, Bart.
John Kynaston, Esq;
Lord Viscount Duncannon,
Alexander Popham, Esq;

NOMINEES.

Dudley Long, Esq; *Of the Petitioner.*
John Parry, Esq; *Of the Sitting Member.*

PETITIONERS.

The Right Hon. Ralph Earl Verney, of the kingdom
of Ireland, and certain Freeholders in his Interest.

Sitting Member.

John Aubrey, Esq;

COUNSEL.

For the Petitioners,

Mr. Graham, and Mr. Law.

For the Sitting Member,

Mr. Rous, and Mr. Douglas.

T H E

C A S E

Of the COUNTY of

B U C K I N G H A M.

THE petition of Earl Verney, and that of the freeholders in his favour, were alike in substance; and contained the general allegations of a majority of legal votes on the side of the petitioner, and of illegal means employed by his opponent Mr. Aubrey to obtain an undue return *.

Mr. W. Grenville, who had been returned with Mr. Aubrey for this county, was not made a party to the petition; his return being unquestioned.

The numbers on the poll stood as following;

For the Right Hon. Wm. Wynd-	}	2261
ham Grenville, —		
John Aubrey, Esq; —		1740
The Right Hon. Earl Verney,		1716

* 40 Journ. 39, 472.

In the beginning of this cause, after the petitions had been read, the same kind of dispute arose between the parties, as happened in the case of Bedfordshire, related in p. 386, respecting the mode of proceeding; i. e. whether by separate hundreds, or through the whole county. It began here before the leading counsel for the petitioner had opened the case; upon his application to the court to know whether he should open the whole of the petitioner's case then, or only the state of that hundred with which he proposed to begin the trial, and so proceed upon the other hundreds respectively in the progress of it; proposing to take the same course as was held in the Bedfordshire Committee then sitting, viz. by separate hundreds. To this the sitting member's counsel objected; and the point was argued on both sides. The reasoning and observations were in substance the same as are before related upon the same question in the Bedfordshire Committee, to which I refer the reader *. But the decision was different from that. The Committee by their resolution, directed

The petitioner to go through the whole of his case.

* See p. 386, 7, 8, 9.

After

BUCKINGHAMSHIRE. 601

After declaring which, the Chairman recommended to the parties, to adhere as much as possible to the arrangement of their evidence by hundreds, for their own mutual convenience, and that of the court.

Accordingly the counsel stated, in a general manner, the whole of the petitioner's case.

The questions proposed to be agitated, were of the same kind as those in Bedfordshire; and the few that were decided have been mentioned in that case. The trial was only carried on for six days; having commenced on Tuesday the 5th of April, and ended on Monday the 11th following: On which day, the petitioner's counsel having made two objections depending on the construction of the disqualifying act of 22 Geo. III. ch. 41. which the Committee determined against them, formally declined any further proceeding against the sitting member. These objections were, to the votes of a subdistributor of stamps, and of a collector of the window tax; the decisions of which have been before related.

Mr. Aubrey was hereupon declared duly elected; of which the Chairman informed the house April the 11th *.

* 40 Journ. 827.

The

After

The following is a list of all the objections upon which the petitioner proceeded in evidence.

Want of due assessment to the land tax	39
Insufficient or no freehold	— 4
Inferior value in itself	— — 5
Reduction of value by mortgage	— 5
Bankruptcy	— — — 1
Copyhold	— — — 1
Mortgagor out of possession	— 1
Subdistributor of stamps	— — 1
Collector of the house and window tax	1

—
58

Upon some points of evidence which were agitated in this cause, of the same kind as those mentioned in p. 568,9 of the Bedfordshire proceedings, the Committee followed the same rules. A witness was going to relate the contents of a voter's title deeds, of which he had obtained inspection by threats. This evidence was objected to, and the Committee hereupon resolved,

That they ought not to compel the production of title deeds: And that the evidence of deeds obtained under the threat of compulsion be not admitted.

In proceeding upon one of the mortgage objections, the circumstances falling within the
above

above resolution, the petitioner could not produce the deeds in evidence; and a witness was called who had made extracts from the deeds, which he was about to read to the court. The counsel for the sitting member objected to the extracts as not the best evidence. The other party answered, That the resolution prevented their producing the originals, and they were therefore to be considered as lost, which would enable them to read the extracts. The Committee resolved,

That the extract of a deed, in the possession of a party not adverse to its production, be not admitted in evidence instead of the original.

[The following case in this trial, was by accident omitted to be inserted in p. 447, next after the case of T. Kidman, to which it bears a relation.

John Creaker was objected to as voting for a freehold of less than 40s. value. He described it on the poll as *land*. His freehold consisted of a house, with a yard annexed to it appurtenant to the house, used by him as a carpenter's yard. The yard alone was worth 20s. but both together more than 40s. a year. The counsel for the sitting member contended for the right of taking the value of the *house* into consideration, in estimating the freehold; because *land* in the legal sense included buildings on the land, and where both made one entire tenement, necessarily passed together; although where they are separate from each other, it might be necessary to describe both. The petitioner's

petitioner's counsel objected to any evidence of the value of the *house*, to support a vote which had been described to consist of land alone; because it would confound the common description of *house and land*, which custom had very properly established for distinguishing the two, according to the requisitions of the law. The court by their resolution allowed the inquiry into the value of the house, in order to make out the qualification of the voter.]

A P P E N D I X.

The statute 28 Geo. III. ch. 52. containing many useful regulations upon the subject of elections, will necessarily be referred to often upon the trials of them: For which reason it seemed to me proper to subjoin an exact copy of it to this volume, for the convenience of parties concerned, viz.

Stat. 28 Geo. III. ch. 52.

An Act for the further Regulation of the Trials of controverted Elections or Returns of Members to serve in Parliament.

WHEREAS, by an act of parliament passed in the Preamble
tenth year of the reign of his present Majesty, inti-^{reciting}
tuled, An Act to regulate the Trials of Controverted Elec-^{10 Geo. III.}
tions, or Returns of Members to serve in Parliament, cer-^{cap. 16;}
tain regulations were established, for a time therein limited,
for the trials of controverted elections, or returns of mem-
bers to serve in parliament: And whereas, by an act passed
in the eleventh year of the reign of his present majesty, in-
tituled, An Act to explain and amend an Act made in the
last Session of Parliament, intituled, *An Act to regulate the* ^{11 Geo. III.}
Trials of Controverted Elections, or Returns of Members to ^{cap. 42;}
serve in Parliament, further regulations were made therein:

And

and 25 Geo.
III. cap. 84.

And whereas the provisions of the said Acts were, by an act passed in the fourteenth year of the reign of his present majesty, continued and made perpetual: And whereas, by an act passed in the twenty-fifth year of the reign of his present majesty, intituled, An Act to limit the Duration of Polls and Scrutinies, and for making other Regulations touching the Election of Members to serve in Parliament for Places within England and Wales, and for Berwick upon Tweed, and also for removing Difficulties which may arise for Want of Returns being made of Members to serve in Parliament. The provisions of the said acts were extended, in the manner therein mentioned, to petitions complaining that no return has been made to a writ issued for the election of a member or members to serve in parliament, within the times limited in the said act; or that such return is not a return of a member or members according to the requisition of the writ: And whereas it is expedient that further regulations should be made for the execution of the said several acts, and that provision should be made for discouraging persons from presenting frivolous or vexatious petitions, or setting up frivolous or vexatious defences, in any of the cases to which the above-recited acts relate: And that provision should also be made for the final decision of questions respecting the rights of voting at such elections, or of nominating or appointing the returning officer or returning officers who are to preside thereat: BE IT THEREFORE ENACTED by the King's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That no petition complaining of an undue election or return, or of the omission of a return, or of the insufficiency of a return, shall be proceeded upon in the manner prescribed in the said above recited acts, unless the same shall be subscribed by some person or persons claiming therein to have had a right to vote at the election to which the same shall

No petition complaining of an undue election or return, to be proceeded upon, unless subscribed as herein mentioned.

shall relate, or to have had a right to be returned as duly elected thereat, or alledging himself or themselves to have been a candidate or candidates at such election. Provided always, That in any case where a writ has been issued for the election of a member to serve in parliament for any district of burghs in that part of Great Britain called Scotland, any such petition as aforesaid shall and may be so proceeded upon, if the same shall be subscribed by any person or persons claiming therein to have had a right to vote at the election of any delegate or delegates, commissioner or commissioners, for chusing a burghs for such district.

II. And be it further enacted, That if, at any time before the day appointed for taking any such petition into consideration, the Speaker of the House of Commons shall be informed, by a certificate in writing subscribed by two of the members of the said house, of the death of the sitting member or sitting members, or either of them, whose election or return is complained of in such petition, or of the death of any member or members returned upon a double return, whose election or return is complained of in such petition, or that a writ of summons has been issued under the great seal of Great Britain, to summon any such member or members to parliament as a peer of Great Britain; or if the House of Commons shall have resolved that the seat of any such member is by law become vacant; or if the said house shall be informed, by a declaration in writing, subscribed by such member or members, or either of them, as the case shall be, and delivered in at the table of the house, that it is not the intention of such member or members to defend his or their election or return; in every such case notice thereof shall immediately be sent by the Speaker to the sheriff, or other returning officer for the county, borough or place to which such petition shall relate: And such sheriff or other returning officer shall cause a true copy of the same to be affixed on the doors of the county hall or town hall, or of the parish

In case of death of sitting member, or of his becoming a Peer, or his place vacated, or if he will not defend, notice to be sent by the Speaker to the returning officer of the place to which any such petition relates, and a copy to be affixed on the doors of the coun-

ty or town parish church nearest to the place where such election has
hall, or usually been held, and such notice shall also be inserted, by
nearest order of the Speaker in the next London Gazette; and the
church, and order for taking such petition into consideration shall, if ne-
inserted in cessary, be adjourned, so that at the least thirty days may in-
the Gazette. tervene between the day on which such notice shall be in-
Order for terposed in the said Gazette, and the day on which such peti-
taking such tion shall be taken into consideration.
petitions in-
to consid-
eration may
be adjourn-
ed.

Within 30 III. And be it enacted, That it shall and may be lawful,
days after at any time within thirty days after the day on which such
such notice, notice shall have been inserted in the said Gazette, for any
any voter person or persons claiming to have had a right to vote at
may petiti- such election, or at the election of delegates or commissioners
on to be ad- for making such election, to petition the house, praying to
mitted a be admitted as a party or parties, in the room of such mem-
party. ber or members, or either of them; and such person or per-
sons shall thereupon be so admitted as a party or parties, and
shall be considered as such, to all intents and purposes what-
ever.

Members
giving no-
tice of in-
tention not
to defend,
not to be
admitted as
parties.

IV. And be it enacted, That whenever the member or
members, whose election or return is so complained of in
such petition, shall have given such notice as aforesaid of his
or their intention not to defend the same, he or they shall
not be admitted to appear or act as a party or parties against
such petition, in any subsequent proceedings thereupon, any
thing in the above-recited acts to the contrary notwithstanding.
And he or they shall also be restrained from sitting in the
house, or voting in any question, until such petition shall
have been decided upon in the manner prescribed by the
above recited acts and by this act.

No proceed-
ings upon
any petiti-
on, unless
one of the
subscribers
enter into a
recogni-
zance to ap-
pear.

V. And be it further enacted, That no proceeding shall
be had upon any petition, by virtue of the above recited acts
or of this act, unless the person or persons subscribing the
same, or some one or more of them, shall, within fourteen
days after the same shall have been presented to the house,

or

or wi
perfo
the h
sum o
the fu
house
taking
before
house
every
mitted
the fa
the pe
the fai
so ente
of the
to the
siderat
special
the ho
such re
larged,
shall,
shall b
zance f
Provid
cogniz
number
VI.
be ente
mons,
same;
be judg
of two
which t
VOL

or within such further time as shall be limited by the house, personally enter into a recognizance to our sovereign lord the king, according to the form hereunto annexed, in the sum of two hundred pounds, with two sufficient sureties in the sum of one hundred pounds each, to appear before the house at such time or times as shall be fixed by the house for taking such petition into consideration; and also to appear before any select Committee which shall be appointed by the house for the trial of the same, and to renew the same in every subsequent session of parliament, until a select Committee shall have been appointed by the house for the trial of the same, or until the same shall have been withdrawn by the permission of the house: And if, at the expiration of the said fourteen days, such recognizance shall not have been so entered into, or shall not have been received by the Speaker of the House of Commons, the Speaker shall report the same to the house, and the order for taking such petition into consideration shall thereupon be discharged, unless, upon matter specially stated and verified to the satisfaction of the house, the house shall see cause to enlarge the time for entering into such recognizance. And whenever such time shall be so enlarged, the order for taking such petition into consideration shall, if necessary, be postponed, so that no such petition shall be so taken into consideration till after such recognizance shall have been entered into and received by the Speaker. Provided always, That the time for entering into such recognizance shall not be enlarged more than once, nor for any number of days exceeding thirty.

VI. And be it enacted, That the said recognizances shall be entered into before the Speaker of the House of Commons, who is hereby authorized and empowered to take the same; and the sufficiency of the sureties named therein shall be judged of and allowed by the said Speaker, on the report of two persons appointed by him to examine the same; of which two persons the clerk, or clerk assistant of the house, shall

and if no recognizance entered into, the order to be discharged, unless cause, &c.

Recognizances to be entered into before the Speaker, and the sureties to be allowed of by him, on report, &c.

shall always be one, and one of the following officers, not being a member of the said house, shall be the other; (that is to say) masters of the high court of Chancery, clerks in the court of King's Bench, prothonotaries in the court of Common Pleas, and clerks in the court of Exchequer: And the said persons so appointed are hereby authorized and required to examine the same, and to report their judgement thereupon; and are also hereby authorized to demand and receive such fees, for such examination and report, as shall be, from time to time, fixed by any resolution of the house of commons.

Sureties living more than 40 miles from London may enter recognizances before a justice.

Affidavits before a matter or justice, to be evidence of the sufficiency of sureties.

VII. Provided always, and be further enacted, That in any case where the party or parties who are to enter into such recognizance, or his or their sureties, or either of them, shall reside at a greater distance from London than forty miles, it shall and may be lawful for such party or parties, surety or sureties, respectively, to enter into such recognizance before any of his majesty's justices of the peace; and his majesty's justices of the peace, or any of them, is and are hereby authorized and empowered to take the same; and such recognizance, being duly certified under the hand of the justice, and being transmitted to the Speaker of the House of Commons, shall have the same force and effect as if the same had been entered into before the said Speaker: Provided also, that it shall and may be lawful for the persons to whom it is referred by the Speaker to examine the sufficiency of such surety or sureties, to receive as evidence in their said examination, any affidavits relating thereto which shall be sworn before any master of the high court of Chancery, or before any of his majesty's justices of the peace; and such master of the high court of Chancery, or justice of the peace, respectively, is hereby authorized to administer such oath, and is authorized and required to certify such affidavit under his hand.

VIII. And

VIII. And be it enacted, That the house shall not per- No petition
mit any such petition to be withdrawn, except so far as the to be with-
same may relate to the election or return of any member drawn un-
or members who shall, since the same shall have been pre- less the seat
sented, have vacated his or their seat by death, or in any vacated.
other manner.

IX. And be it enacted, That if the petitioner or peti- Recogni-
tioners who shall have entered into such recognizance as zances of pe-
afore said, shall not appear before the house by himself or tioners not
themselves, or by his or their counsel or agents, within one appearing at
hour after the time fixed, in pursuance of the above recited the time
acts and of this act, for calling in the respective parties fixed, to be
their counsel or agents, for the purpose of proceeding to the certified into
the Exche-
appointment of a select Committee; or if the select Com-
mittee appointed in pursuance of the said acts and of this
act, for the trial of such petition, shall inform the house
that such person or persons did not appear before the said
Committee by himself or themselves, or by his or their
counsel or agents, to prosecute their said petition; or if such
person or persons shall neglect to renew their said petition
within four sitting days after the day of the commencement
of every session of the same parliament, subsequent to that
in which such petition was first presented, and until a select
Committee shall have been appointed for trial of the same,
or until the same shall have been withdrawn by the permission
of the house, in every such case such person or persons shall
be held to have made default in his or their said recogni-
zance: And the Speaker of the House of Commons shall
thereupon certify such recognizance into the court of Ex-
chequer, and shall also certify that such person or persons
have made default therein; and such certificate shall be con-
clusive evidence of such default, and the recognizance being
so certified shall have the same effect as if the same were
estreated from a court of law: Provided always, That such
recognizance and certificate shall in every such case be deli-
vered, Recogni-
zance and
certificate to
be delivered

into the Ex- vered by the clerk or clerk assistant of the House of Com-
chequer. mons, into the hands of the Lord Chief Baron of the Ex-
chequer, or of one of the Barons of the Exchequer, or of
such officer of the court of Exchequer as shall be appointed
by the said court to receive the same.

Good Friday X. And whereas, by several provisions contained in the
to be ex- above-recited acts made in the tenth and eleventh years of
cepted. the reign of his present majesty, Sunday and Christmas Day
are excepted from the general regulations of the said acts;
be it hereby enacted, That in every such case, Good Friday
shall also be excepted therefrom, in the same manner as if
the same had been specially excepted in the said acts.

If on the day XI. And be it also enacted, That if, on the day imme-
preceding a diately preceding any of the three following days, that is to
holiday, say, Christmas Day, Whitsunday, or Good Friday, after
there shall reading the order of the day for taking any such petition as
not be a afore said in consideration, it shall be found that there are
Committee, not one hundred members present, or that the number of
the order forty-nine members not set aside or excused cannot be com-
and the pleted, it shall and may be lawful for the house, if they shall
house, may for any number of days, and the house shall then
be adjourned immediately be adjourned to the hour and day to which such
for any order shall be so adjourned.

On days ap- XII. And whereas it is enacted, by the said act passed in
pointed for the eleventh year of the reign of his present majesty, that on
petitions, the day appointed for taking such petition into consideration,
the house the house shall not proceed to any other business whatsoever,
may receive except the swearing of members, previous to the reading of
reports from the order of the day for that purpose; be it hereby enacted,
Select Com- That it shall and may be lawful for the house, previous to
mittees, and reading such order, to receive any report from any select
House of Committee appointed in pursuance of the above-recited acts
Lords. or of this act, and to enter the same upon their Journals,
and

and to give the necessary orders and directions thereupon; and that previous to reading the said order, the clerk of the crown may be admitted to alter or amend any return, in pursuance of an order made on a preceding day, or on that day; and also, that it shall and may be lawful for the house, previous to reading the said order, to postpone the same for the purpose of attending his majesty or his majesty's commissioners, in the House of Lords, in consequence of any message from his majesty or from his majesty's commissioners, signified to the house in the usual manner.

XIII. And be it also enacted, That if, within one hour after the time fixed in pursuance of the above-recited acts and of this act, for calling in the respective parties their counsel or agents, for the purpose of proceeding to the appointment of a Select Committee, the petitioner or petitioners, or some one or more of them, who shall have signed any such petition, shall not appear by himself or themselves or by his or their counsel or agents, the order for taking such petition into consideration shall thereupon be discharged, and such petition shall not be any further proceeded upon in the manner directed in the above-recited acts, and in this act.

XIV. And be it enacted, That if, within one hour after the time so appointed as aforesaid, the sitting member or sitting members, or other party or parties opposing the said petition, shall not appear by himself or themselves or by his or their counsel or agents, or if, at the time so appointed as aforesaid, there shall be no party before the house opposing the petition, the house shall proceed to appoint a select Committee, to try the merits of such petition, in the following manner; (that is to say) That the names of forty-nine members shall be drawn, in the manner prescribed in the above-recited acts; but in reducing the list of such names to thirteen, the place of a party opposing the petition shall be supplied by the clerk appointed to attend the said Committee,

who shall, as often as it shall come to his turn, as supplying the place of the party opposing the petition, to strike out a name, strike out that name which then shall be first in the said list; and in every case where the party opposing the petition would be impowered by the above-recited acts, to nominate one member to be added to the said thirteen, the said thirteen shall, from among the persons present in the house at the time of drawing the names of the members, chuse one person to supply the place of the member to have been so nominated, in the same manner as is directed by the above-recited act made in the eleventh year of his majesty's reign, in the case where there are more than two parties on distinct interests.

The same method of reducing the list to 13 members, &c. to be followed when the right to it waived.

XV. And be it further enacted, That the same method of reducing the list of members drawn to thirteen, and of nominating a member to be added to the thirteen remaining on the said list, shall be respectively followed, whenever any party shall waive his right of striking off names from the said list, or of nominating a member to be added to the said thirteen.

Witnesses not attending, or giving false evidence, &c. to be committed.

XVI. And be it further enacted, That if any person summoned to attend the said select Committee by the warrant of the Speaker of the said house, or by order of the said Committee, shall disobey such summons, or shall give false evidence, or prevaricate, or otherwise misbehave in giving, or in refusing to give evidence before the said Committee, the said Committee shall have power, by a warrant to be signed by the Chairman, and directed to the serjeant at arms attending the House of Commons, or to his deputy or deputies, to commit such person (not being a peer of the realm or a lord of parliament) to the custody of the said serjeant, without bail or mainprize, for any time not exceeding twenty-four hours if the house shall then be sitting; or if not, then for a time not exceeding twenty-four hours after the hour to which the house shall then be adjourned.

XVII.

XVII. And whereas it is enacted by the said act made in the tenth year of his majesty's reign, That if more than two members of the said select Committee shall, on any account, be absent therefrom, the said select Committee shall adjourn in the manner in the said act directed, and so from time to time, until thirteen members are assembled; and that no such determination as in the said act is mentioned shall be made, nor any question be proposed, unless thirteen members shall be present; and that no member shall have a vote on such determination, or any other question or resolution, who has not attended during every sitting of the said select Committee; and that, in case the number of members able to attend the said Committee shall, by death or otherwise, be unavoidably reduced to less than thirteen, and shall so continue for the space of three sitting days, the said Committee shall be dissolved, and another chosen to try and determine the matter of such petition, in the manner in the said act before provided; Be it hereby enacted, That whenever any Committee shall have sat for business fourteen days, not including those days on which they shall have adjourned on account of the absence of any member, nor including Sunday, Christmas Day, or Good Friday, it shall and may be lawful for them to proceed to business, if a number of members not less than twelve be present; and in such case, the Committee shall not be dissolved by reason of the absence of the members, unless the number of members able to attend the same shall, by death or otherwise, be unavoidably reduced to less than twelve, and shall so continue for the space of three sitting days: And whenever any Committee shall in the like manner have sat for business twenty-five days, it shall and may be lawful for them to proceed to business, if a number of members not less than eleven be present; and in such case, the Committee shall not be dissolved by reason of the absence of the members, unless the number of members able to attend the same shall, by death

Recital of
sect. 24 of
10 G. III.
ch. 16.

If a Com-
mittee shall
have sat 14
days, 12
members
may pro-
ceed there-
in;

and if 25
days, 11
members
may pro-
ceed.

or otherwise, be unavoidably reduced to less than eleven, and shall so continue for the space of three sitting days.

Committees
to report
whether pe-
titions, &c.
are frivolous
or vexati-
ous.

XVIII. And be it further enacted, That every such Committee, at the same time that they report to the House their final determination on the merits of the petition which they were sworn to try, shall also report to the House whether such petition did, or did not, appear to them to be frivolous or vexatious: And that they shall in like manner report, with respect to every party or parties who shall have appeared before them in opposition to such petition, whether the opposition of such party or parties respectively did, or did not, appear to them to be frivolous or vexatious: And that if no party shall have appeared before them in opposition to such petition, they shall then report to the House whether such election or return, or such alledged omission of a return, or such alledged insufficiency of a return, as shall be complained of in such petition, according as the case shall be, did, or did not appear to them to be vexatious or corrupt.

Parties op-
posing pe-
titions report-
ed vexatious
or frivolous,

XIX. And be it enacted, That whenever any such Committee shall report to the House, with respect to any such petition, that the same appeared to them to be frivolous or vexatious, the party or parties, if any, who shall have appeared before the Committee in opposition to such petition, shall be entitled to recover, from the person or persons, or any of them, who shall have signed such petition, the full costs and expences which such party or parties shall have incurred in opposing the same; such costs and expences to be ascertained in the manner herein-after directed.

and petiti-
oners re-
ported to
have been
vexatiously
or frivo-
lously op-
posed, to have
costs.

XX. And be it also enacted, That whenever any such Committee shall report to the House, with respect to the opposition made to such petition by any party or parties who shall have appeared before them, that such opposition appeared to them to be frivolous or vexatious, the person or persons who shall have signed such petition shall be entitled

to recover from such party or parties, or any of them, with respect to whom such report shall be made, the full costs and expences which such petitioner or petitioners shall respectively have incurred in prosecuting their said petition; such costs and expences to be ascertained in the manner herein-after directed.

XXI. And be it also enacted, That whenever, in any case where no party shall have appeared before such Committee in opposition to such petition, such Committee shall report to the House, with respect to the election or return, or to the alledged omission of a return, or to the alledged insufficiency of a return, complained of in any such petition, that the same appeared to them to be vexatious or corrupt, the person or persons who shall have signed such petition shall be entitled to recover from the sitting member or sitting members (if any) whose election or return shall be complained of in such petition, such sitting member or sitting members not having given notice as aforesaid of his or their intention not to defend the same, or from any other person or persons whom the House shall have admitted or directed to be made a party or parties to oppose such petition, the full costs and expences which such petitioner or petitioners shall have incurred in prosecuting their said petition; such costs and expences to be ascertained in the manner herein-after directed.

Where no party appears in opposition to a petition, the costs to be paid by the sitting members, &c.

XXII. And be it enacted, That in the several cases herein-before mentioned, the costs and expences of prosecuting or opposing any such petition shall be ascertained in manner following; (that is to say), That on application made to the Speaker of the House of Commons, by any such petitioner or petitioners, or party or parties, as before-mentioned, for ascertaining such costs and expences, he shall direct the same to be taxed by two persons, of whom the clerk or clerk assistant of the House shall always be one, and one of the following officers, not being a member of the House, shall

How such costs and expences are to be ascertained.

be

be the other; (that is to say), Masters in the High Court of Chancery, clerks in the court of King's Bench, prothonotaries in the court of Common Pleas, and clerks in the court of Exchequer; and the persons so authorized and directed to tax such costs and expences shall, and they are hereby required to examine the same, and to report the amount thereof to the Speaker of the said House; who shall, on application made to him, deliver to the party or parties a certificate, signed by himself, expressing the amount of the costs and expences allowed in such report; and the persons so appointed to tax such costs, and report the amount thereof, are hereby authorized to demand and receive, for such taxation and report, such fees as shall be, from time to time, fixed by any resolution of the House.

If costs, &c.
be not paid
on demand,
they may be
recovered
by action of
debt, &c.

XXIII. And be it enacted, That it shall and may be lawful for the party or parties entitled to such costs and expences, or for his, her, or their executors or administrators, to demand the whole amount thereof, so certified as above, from any one or more of the persons respectively, who are herein-before made liable to the payment thereof, in the several cases herein-before mentioned; and, in case of nonpayment thereof, to recover the same by action of debt, in any of his Majesty's courts of record at Westminster; in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them (in the sum to which the costs and expences, ascertained in manner aforesaid, shall amount) by virtue of this act; and the certificate of the Speaker of the House of Commons, under his signature, of the amount of such costs and expences, together with an examined copy of the entries in the Journals of the House of Commons, of the resolution or resolutions of the said Select Committee or Committees, shall be deemed full and sufficient evidence in support of such action of debt: Provided always, That in every such action

action of debt, no wager of law, or more than one impar- Judgement
lance, shall be allowed; and the party or parties in whose in such ac-
favour judgment shall be given in any such action, shall re- tions to en-
cover his or their costs. title the par-
ty to costs.

XXIV. And be it further enacted, That in every case Persons pay-
where the amount of such costs and expences shall have been ing costs
so recovered from any person or persons, it shall and may be may recover
lawful for such person or persons to recover in like manner a proportion
from the other persons, or any of them, if such there shall from any
be, who shall be liable to the payment of the said costs and persons lia-
expences, a proportionable share thereof according to the ble.
number of persons so liable.

XXV. And be it further enacted, That whenever any When peti-
such Select Committee, appointed to try the merits of any tions depend
such petition as aforesaid, shall be of opinion that the merits on questions
of such petition do wholly or in part depend on any question respecting
or questions which shall be before them respecting the right the right of
of election for the county, city, borough, district of burghs, election, &c.
or other place to which such petition shall relate; or respect- statements
ing the right of chusing nominating or appointing the re- of such right
turning officer or returning officers, who is or are to make to be deli-
return of such election, the said Committee, in such case, vered in
shall require the counsel or agents for the several parties, or writing;
if there shall be none such before them, shall then require and the
the parties themselves to deliver to the clerk of the said committee
Committee, statements in writing of the right of election, to report
or of chusing nominating or appointing returning officers, their judge-
for which they respectively contend. And the Committee ment on
shall come to distinct resolutions on such statements, and shall such state-
at the same time that they report to the House their final ments.
determination on the merits of such petition, also report to
the House such statement or statements, together with their
judgement with respect thereto. And such report shall there-
upon be entered in the Journals of the House, and notice Report to be
thereof shall be sent by the Speaker to the sheriff, or other entered in
returning the Journals,
and notice
thereof sent

to the re-
turning offi-
cer.

returning officer of the place to which the same shall relate; and a true copy of such notice shall, by such sheriff or other returning officer, be forthwith affixed to the doors of the county hall or town hall or of the parish church nearest to the place where such election has usually been held; and such notice shall also be inserted by order of the Speaker in the next London Gazette.

Any person
may, within
12 months
after, peti-
tion against
the right
thereby
established;

XXVI. And be it enacted, That it shall and may be lawful for any person or persons, at any time within twelve calendar months after the day on which such report shall have been made to the House, or within fourteen days after the day of the commencement of the next session of parliament after that in which such report shall have been made to the House, to petition the House to be admitted as a party or parties to oppose that right of election, or of choosing, nominating or appointing the returning officer or returning officers, who is or are to make return of such election, which shall have been deemed valid in the judgment of such Committee.

but if no
such peti-
tion, the
judgement
to be con-
clusive.

XXVII. And be it enacted, That if no such petition shall be so presented within the time above limited for presenting the same, the said judgement of such Committee, on such question or questions, shall be held and taken to be final and conclusive in all subsequent elections of members of parliament for that place to which the same shall relate, and to all intents and purposes whatsoever; any usage to the contrary notwithstanding.

Forty days
to intervene
between the
presenting
and hearing
such peti-
tions.

XXVIII. And be it enacted, That whenever any such petition shall be so presented, a day and hour shall be appointed by the House for taking the same into consideration, so that the space of forty days at the least shall always intervene, between the day of presenting such petition and the day appointed by the House for taking the same into consideration; and notice of such day and hour shall be inserted, by order of the Speaker, in the next London Gazette, and shall

also

also be sent by him to the sheriff or other returning officer for the place to which such petition shall relate; and a true copy of such notice shall, by the said sheriff or other returning officer, be forthwith affixed to the doors of the county hall or town hall or of the parish church nearest to the place where such election has usually been held.

XXIX. And be it enacted, That it shall and may be lawful for any person or persons, at any time before the day so appointed for taking such petition into consideration, to petition the House to be admitted as a party or parties to defend such right of election, or of chusing nominating or appointing the returning officer or returning officers; and such person or persons shall thereupon be so admitted, and shall be considered as such to all intents and purposes whatever.

XXX. And be it enacted, That at the hour appointed by the House for taking such petition into consideration, the House shall proceed to appoint a Select Committee to try the merits thereof, according to the directions of the above-recited acts, and of this act. And such Select Committee shall be sworn to try and determine the merits of such petition, so far as the same relate to any question or questions respecting the right of election for the place to which the petition shall relate, or respecting the right of appointing nominating or chusing the returning officer or returning officers who are to make return of such election: And the determination of such Committee on such question or questions, shall be entered on the Journals of the House, and shall be held and taken to be final and conclusive in all subsequent elections of members of parliament for that place to which the same shall relate, and to all intents and purposes whatever, any usage to the contrary notwithstanding.

XXXI. And whereas it is amongst other things enacted, ^{2 Geo. II. cap. 24, sect. 4.} by an act passed in the second year of the reign of his late Majesty king George the Second, intituled, An Act for the

more

more effectual preventing Bribery and Corruption in the Elections of Members to serve in Parliament, That such votes shall be deemed to be legal which have been so declared by the last determination in the House of Commons; which last determination concerning any county shire city borough cinque port or place, shall be final to all intents and purposes whatever, any usage to the contrary notwithstanding; Be it enacted, That so much of the said act as is above recited shall be, and the same is hereby repealed, in so far only as the same relates, or might be construed to relate, to any such determination to be made in the House of Commons subsequent to the passing of this act.

XXXII. And be it enacted, That all and every the rules regulations authorities and powers prescribed or given by the above-recited acts, or by this act, to Select Committees for the trial of controverted elections or returns, shall be in full force and effect with respect to Select Committees appointed by virtue of this act, for the trial of such question or questions of right as aforesaid, in as full and ample a manner as if the same were herein repeated, and particularly and specially enacted, concerning such Select Committees: Provided always, That the several rules and regulations herein-before enacted, by which certain persons are directed to enter into recognizances, and by which certain persons are made liable to the payment of costs, in the particular manner and in the several cases herein before specified, shall not be construed to apply to the case of any petition presented in pursuance of this act, and relating solely to any question or questions respecting the right of election, or of choosing nominating or appointing a returning officer or returning officers.

XXXIII. And be it further enacted, That whenever it shall happen that parliament shall be prorogued while any Select Committee shall be sitting for the trial of any such petition as aforesaid, and before they shall have reported to the

the House their determination thereon, such Committee shall not be dissolved by such prorogation; but shall be thereby adjourned to twelve of the clock on the day immediately following that on which parliament shall meet again for the dispatch of business (Sundays, Good Friday, and Christmas Day, always excepted): And all former proceedings of the said Committee shall remain and continue to be of the same force and effect, as if parliament had not been so prorogued: And such Committee shall meet on the day and hour to which it shall be so adjourned, and shall thenceforward continue to sit from day to day, in the manner provided in the above-recited acts and in this act, until they shall have reported to the House their determination on the merits of such petition.

FORM of the RECOGNIZANCE referred to in this Act.

BE it remembered, That on the *Day of*
in the Year of our Lord

*before me A. B. [Speaker of the
House of Commons] or [One of His Majesty's Justices of the
Peace for the County of] came C. D.
E. F. and J. G. and severally acknowledged themselves to owe
to our Sovereign Lord the King the following Sums; that is to
say, the said C. D. the Sum of Two hundred Pounds, and the
said E. F. and the said J. G. the Sum of One hundred Pounds
each, to be levied on their respective Goods and Chattels, Lands,
and Tenements, to the Use of our said Sovereign Lord the King,
His Heirs and Successors, in case the said C. D. shall fail in
performing the Condition hereunto annexed.*

The

The Condition of this Recognizance is, that if the said C. D. shall duly appear before the House of Commons, at such Time or Times as shall be fixed by the said House for taking into Consideration the Petition signed by the said C. D. complaining of an undue Election or Return for the of [Here specify the County, City, Borough, or District of Burghs] *or, complaining that no Return has been made for the said [] of [] within the Time limited by Act of Parliament, or, that the Return made for the said [] of [] is not a Return of a Member or Members according to the Requisition of the Writ, and shall appear before any Select Committee which shall be appointed by the House of Commons for the Trial of the same, and shall renew his said Petition in every subsequent Session of this present Parliament, until a Select Committee shall have been appointed by the said House for the Trial of the same, or until the same shall have been withdrawn by the Permission of the said House; then this Recognizance to be void, otherwise to be of full Force and Effect.*



I N D E X

T O T H E

FIRST AND SECOND VOLUMES.

A.

- ABBOT** and Plumbe, case of, i. 269.
Action, possessory and of the right, i. 336.
Adjournment, special, of a Committee, i. 280, 281—ii. 366. Of the House for a Committee, ii. 612.
Administrator, i. 212.
Agency in bribery, evidence of, i. 83, 89—ii. 532. Not necessary to be *previously* proved, i. 470.
Agent, his principal answerable, i. 38, 49, 59, 85.
Aldborough, returns from, i. 16.
Alien, objection to a freeholder, ii. 587.
Allen and Sayer, case of, i. 307.
Alms, i. 195—ii. 856, 364. Objection of, restrained, ii. 365.
 —, in counties, ii. 563, 567, 585.
Alston and Wells, case of, i. 211, 296.
Amendment in pleadings, i. 340, 341, 348, 386.
Annuity, cases of, in Bedfordshire, ii. 440, &c. 497, 502, 505.
 — act for registering, ii. 499, 504.
Appeal to sessions, i. 81, 82, 83, 103, 104.
Appriser and Adjudger, i. 300.
Arch, John, case of, in Bedfordshire, ii. 552.
Assessment to the land tax, Act of 20 Geo. III. relating to, ii. 476, 590. general effect of, 396, 587. how construed, 479, 497, 536, 537, 539. Form of, 479. Depending on situation or description of the freehold, 509, &c. Explained when doubtful, 513, 518. Form and mode of rating, 523, 524, 525. Duplicates of, 527, 528, 592, 593, 596.
Atterbury, his book on convocations and dispute with Wake, ii. 314.

VOL. II.

S f

Atwater,

I N D E X.

Atwater, G. case of, in Downton, i. 223.
Aylesbury, case of, in 1691, i. 66.
Ayres, T. case of, in Bedfordshire, i. 377, 381—ii. 402.

B.

Babb's case, i. 315.
Bailey, John, case of, in Cricklade, ii. 512.
Bailiff of Downton, i. 118, 120, 129, &c. 284.
 — of Cricklade. See *Returning Officer*.
Barbers and Surgeons, how incorporated, ii. 243.
Barnard, Sir John, case of, in Bedfordshire, ii. 519.
Barringer, Thomas, case of, in Bedfordshire, ii. 541.
Beaumont, Richard, case of, in Bedfordshire, ii. 519.
Bedford, case of charities, i. 198.
Bedfordshire Committee, act for preserving, ii. 398.
Belfield, H. case of, in Bedfordshire, ii. 510.
Benefice, cases of freeholds by, ii. 516, 518, 585.
Bennett, Edward, case of, in Bedfordshire, i. 382.
Betts of Weymouth, case of, i. 429.
Bewdley, case of, in 1676, i. 65. In 1708 and 1710, ii. 230, 231.
Bishop of Chester's case, i. 314.
Blackstone, his commentaries cited, i. 164, 302. His tract on copyholders, i. 164.
Blackwell, J. case of, in Bedfordshire, ii. 448.
Blake, J. case of, in Downton, i. 231.
Bond and Seawell, case of, i. 240.
Bonfield, J. case of, in Bedfordshire, ii. 440.
Booths for polling in counties, ii. 344, 415. Votes confined to them, 418, 420, 510, 511.
Boroughs, inquiry into their antient constitution, i. 98—ii. 227.
Bosfiney, case of, in 1742, i. 432, 444, 445.
Bouverie, Edward, case of, in Downton, i. 242.
Brady, his opinion cited, ii. 81.
Braher, James, case of, in Bedfordshire, ii. 530.
Bribery, i. 40, 41, 45, 46, 57, 60, 65, 83.
 —, bill for preventing, in 1784, i. 47, 67, 68.
Bristol, freeman's oath, ii. 102.
Buckinghamshire, case of, ii. 599.
Bull, L. case of, in Bedfordshire, i. 354, 392.
Buller, Judge, his opinion on acceptance of charters, ii. 185.
Burgage tenure, i. 178, 179, 182, 183, 216, 301, 303—ii. 164, 187.
 —, not within the Splitting act, i. 154.
Burgage-rent, i. 182, 192, 303.
Burgess, meaning of the word, i. 8—ii. 13, 30, 32, 57, 66.
 —, contradistinguished from *freeman*, ii. 30, 35, 57, 67, 68, 91.
Burges, W. case of, in Bedfordshire, ii. 567.
Burgh (*Free*) what, ii. 81.

Burgeyne

I N D E X.

Burgoyne and Moss, case of, ii. 246.
Burnet, Bishop, his account of the clergy in parliament, ii. 314,
 &c.
Burr, T. G. case of, in Bedfordshire, ii. 561.
Burrough, S. case of, in Bedfordshire, ii. 418.

C.

Callington, case of, in 1772, i. 444, 445, 453, 457.
Canons of the clergy, their authority, ii. 277. Canon 32, ii. 301.
 Canon 76, ii. 280, 299. Canons of 1571, ii. 281, 302. Of
 1222, ii. 282.
Cardigan, case of, in 1775, ii. 341, 349.
Carmarthen, case of, in 1768, ii. 230.
Cave, Thomas, case of, in Bedfordshire, ii. 528.
Chadwick and Smith, case of, ii. 438.
Chamberlain of London and Evans, case of, ii. 579.
Charge on land, what, ii. 455.
Charity, case of, in Downton, i. 195.
Charlton, S. case of, in Bedfordshire, ii. 508.
Charter, ineffectual against election rights, ii. 167, 168, 170, 172.
 —, partial acceptance of, ii. 173, 184, 185.
 — to Pontefract, i. 17. to Lyme, ii. 28. to Saltaſh, ii.
 117, 121, 131, 138, 159.
 —, debate in parliament on that of Saltaſh, ii. 250.
Charters restored by proclamation, ii. 260.
Chattels of a freehold nature, ii. 441, 443, &c.
Check-book, evidence of, i. 339, &c.—ii. 406, 407.
Cheſter, Charles, case of, in Bedfordshire, ii. 413.
Cheſter City, case of its charter, ii. 252, 254.
Chippenham, case in 1691, i. 66.
Church of England, application of the word *eſtabliſhed*, ii. 578,
 580.
Cinque Ports, the Lord Warden's claim abolished, ii. 96.
Clarke, S. case of, in Downton, i. 229. In Bedfordshire, ii. 520.
Clements, W. case of, in Cricklade, ii. 512.
Clergy, ſeparated from laity, ii. 275, 279, 287, 288, 298.
 — their antient aſſembling in parliament, ii. 293, 313, &c.
 — allowed to vote in elections, 297, 310, though contrary
 to a reſolution of the Commons, 297, *note*.
 — their petition to Elizabeth and James I. ii. 315.
Clerk in orders, defined, ii. 272.
Cleveland, Mr. his evidence in Saltaſh, ii. 146.
Colcheſter, right of election, i. 417, 448. Obſervations on the
 determination in 1784, 457, 458.
Collector of window tax may vote, ii. 541, 551, 552. Statute
 relating to, ii. 541, 542.
Colton, C. his evidence in Saltaſh, ii. 222. Action againſt, as
 Returning Officer, 245.

I. N. D. E. X.

- Committees* of election, institution and jurisdiction of, i. Pref. 21, 24—i. 406, 453—ii. 61, 88, 109, &c. 398, 615, 616, 622.
 — adjournment of, i. 281—ii. 366. Not dissolved by
 — prorogation, ii. 622.
 — of privileges, &c. i. Pref. 28, i. 404, 405—ii. 41, 70.
 See *Proceedings*.
Commonalty, Community, Communia, meanings of these words, ii. 165, 183, 237.
Commons limit the prerogative in election rights, ii. 226, 232.
Comyns, Serjeant, his case at Malden, i. 430, 437, 454.
Conclusory Law, what, ii. 482, 490.
Conquest, James, case of, in Bedfordshire, ii. 422.
Construction, rules of, in statutes, i. 158—ii. 487, 493.
Conventicle defined, ii. 103.
Conveyance to trustees, its use, i. 150.
Convocation of the clergy, ii. 293, 294.
Copy of poll, evidence, i. 278—ii. 203, 204, 208.
Corporations, their institution, antient and present state, i. 99—
 ii. 179, 180, 236, 237, 239, &c. 241, 244.
Costs of petition or defence, how answered, i. Pref. 22—ii. 616,
 619, 622.
Counsel before Committees, i. 469, 471, 472—ii. 95.
County elections, general state of objections in them in the Jour-
 nals, ii. 581. Order for lists, 382.
Coventry, case of, in 1781, ii. 342, 349.
Cradock, Dr. case of, in 1661, ii. 273, 290.
Creaker, J. case of, in Bucks, ii. 603.
Cricklade, right of election, ii. 324, 355. Altered by stat. 325.
 — Complaint and report against the bailiff, 327, 335, 337, 370, &c.
 —, case of, in 1689, 1695, ii. 348.
Crown, power of, to create boroughs discussed, ii. 226.
Crouch, James, case of, in Bedfordshire, ii. 527.

D.

- Darton*, his evidence, in Saltsb., ii. 149.
Day, W. case of, in Bedfordshire, ii. 407.
Deacon, eligible to parliament, ii. 271, 307. How represented
 in convocation, 277, 294. Nature of his function, 285, 286,
 287, 300, 301.
Deed, qualities of, i. 235, 244, 256, 309, 315, 316.
 —, effect of stamps on, i. 252, 255, 263.
 —, nature of voluntary, i. 252, 253, 259, 260.
 —, production of in evidence, not compelled, ii. 568.
Dent, Charles, case of, in Oxfordshire, ii. 582.
Derby, case of, in 1774, i. 366.
Descent, case of under the Assessment act, ii. 531.
Description of freeholds on the poll, how far binding, ii. 408,
 412, 413, 419, 420, 444, 446, 447, 504, 509, 511, 522.
Dickins,

I N D E X.

- Dickins, W.* case of, in Bedfordshire, ii. 432.
Dicks, Ab. case of, in Bedfordshire, ii. 413.
Dilly, John, case of, in Bedfordshire, ii. 393.
Directory law, what, ii. 482, 490.
Disqualification of members for bribery, i. 69, 70, 71, 72.
 — by attendance in the House of Lords, ii. 308.
 — of voters by office, ii. 541, &c.
Disqualifying act, ii. 541, 544, 552, 558.
Dissenters, how affected by the act of Toleration, ii. 433, &c. 579.
Dissenting minister's vote rejected, ii. 440.
Dowbiggen, Rev. Richard, case of, in Bedfordshire, ii. 507.
Dower, effect of on freehold vote, ii. 450.
Downton, right of election, i. 111. Forms of appointment of the returning officer and his deputies, 284, 287, 288, 291, 293.
Drewe and Colton, case of, ii. 245.
Duncombe, Mr. his will, i. 147.
Dunn, J. and Joan, their evidence in Saltash, ii. 140, 146, 153.
Duplicates of land tax assessment, evidence, ii. 527, 528, 596.
 How to be made, 592, 593.

E.

- Eddowes and Hopkins*, case of, i. 341.
Eldridge and Knott, case of, ii. 427.
Election of members, antient manner of, i. 294.
Elegit, effect of, ii. 452, 463.
Entry to avoid a fine, i. 209.
Equality of votes, cases of, i. 103.
Equitable estate, i. 150, 156, 157, 206, 210, 211—ii. 422, 423, 424, 425, 588, 589.
Erase in deeds, its effect, i. 247.
Escrow described, i. 258, 315.
Essex, case of, in 1716. Objections in, ii. 584, 585.
Estate. See *Freehold, Trust, Equitable, Joint*.
Evidence, viva voce, advantages of over written, i. 90. Of acts of an agent to affect his principal, i. 38, 49, 50, 54, 90, 469, 470. Of tendering votes, 146—ii. 405, 406, 408, 409, 411. Of voters themselves, *ib.* and i. 384, 392—ii. 569. Of return to a commission, i. 265, 267. Of a grantor to prove his own deed, 267, 272. Of copies, ii. 204. Of copy of a poll, i. 277—ii. 203. Of usage and reputation, ii. 28, 208, 210. Of a cancelled charter, ii. 28. Of right of election, ii. 340, 346. Of check books, i. 339—ii. 407. Of land tax duplicates, ii. 527, 528. Of a voter's declarations against his vote, *ib.* 411, 569. Of deeds, not compulsive, ii. 568, 602, 603. To contradict the poll-book, i. 330, 331, 332—ii. 402, &c. Confined to allegations of petitions, i. 279—ii. 533. To lists of objections, ii. 532, 533, 566. On whom burthen of proof falls, ii. 407, 513, 518, 537.
Executor and Heir, their several rights, ii. 441, &c. 581.

I N D E X.

Expences of election, what are called lawful, i. 29, 47, 57. Agreement for, i. 25.
Eyre, Thomas, case of, in Bedfordshire, i. 377, 381—ii. 402.

F.

Faggots, term applied to certain voters, ii. 139, 213, 217.
Farr's, Burgages in Downton, so called, i. 171, 173.
Faulkner's case, i. 340, 347.
Faalty, by the burgesses of Saltaſh, ii. 127, &c.
Feoffment, objected to, i. 242.
Feverſham, Lord, his will, i. 202.
Field, H. case of, in Bedfordshire, ii. 529.
Fife, case of in 1780, i. 455.
Fitchett, Richard, case of, in Bedfordshire, ii. 523.
Fleta on erasures in deeds cited, i. 317.
Follett, B. evidence of, in Lyme, ii. 43, &c.
Forſyth, A. case of, in Downton, i. 222.
Foſter, Rev. James, case of, *ib.* i. 216.
Fotheringham and Greenwood, case of, i. 319.
Freehold, insufficient, ii. 422, &c. Fraudulent, ii. 428. See the several particular heads.
Freeholder in towns. See *Burgess*.
Freeholder's oath, ii. 445.
Freeman contradistinguished from burgess, ii. 30, 35.
 ———, term applied to persons not incorporated, i. 97—ii. 243.
 ———, honorary, ii. 48.
Furneaux, Dr. his letters to Judge Blackstone, ii. 579.

G.

Gaborian, James, evidence of, in Saltaſh, ii. 141, 152, 154, 223.
Gale, W. case of, in Bedfordshire, ii. 497.
Game acts, ii. 588, 589.
Garbling clause in charters of Charles II. ii. 249, 253. Debate on it in 1775, 250, 252.
Gardener, Th. case of, in Bedfordshire, ii. 501.
Geary, W. case of, in Bedfordshire, ii. 527.
George, M. case of, *ib.* ii. 522.
Gilbert, Chief Baron, quoted on the rights of the clergy, ii. 310.
 ———, *James*, case of, *ib.* ii. 447.
Glanville, Serjeant, his book cited, i. 15, 17, 103—ii. 76.
Gloucestershire case in 1777 referred to, ii. 385, 387, 436, 489, 500, 517, 565.
Goddard, Th. case of, in Downton, i. 248.
Goodfellow, J. case of, *ib.* i. 250.
Gorham, G. J. case of, in Bedfordshire, ii. 514.
Gough and Cecil, case of, i. 317.

Grantet,

I N D E X.

Grantee, when to make election, i. 184, 185.
Green, S. case of, in Downton, i. 229.
Gregory, D. case of, in Bedfordshire, ii. 521.
Guilds, their antient institution, ii. 239, &c. Meaning of the word, 241, 242.

H.

Hale, Chief Justice, his opinion on the ecclesiastical law, ii. 279.
Handcomb, M. case of, in Bedfordshire, ii. 425.
Hapgood, R. case of, in Cricklade, ii. 538.
Hardwick, *Earl of*, his opinion on the competency of witnesses, i. 410. On the garbling charters, ii. 173.
Hare and Jones, case of, i. 213.
Harley, the Speaker, his opinion on the Statutes of residence, ii. 490.
Harrison, Th. case of, in Bedfordshire, ii. 523.
Harrodine, J. case of, *ib.*
Harwood, Th. case of, in Bedfordshire, ii. 509.
Hawkins and Chapel, case of, i. 307.
Heavitree, case of, i. 79.
Hockmondwick, case of, i. 80.
Heir and Executor, their several rights, ii. 441, &c. 581.
Hellston, case of, ii. 229.
Hempsted, Rev. J. case of, in Bedfordshire, ii. 558.
Hickes, H. his evidence in Saltash, ii. 223.
Hill, J. case of, in Bedfordshire, ii. 502.
Hinde, Rev. H. case of, *ib.* ii. 526.
Hoare, N. his evidence in Saltash, i. 145, 152.
Hody on convocations, ii. 312.
Holt, Chief Justice, his opinion on rights of voting, i. 98—ii. 165, 186.
Honiton, case of, in 1715, i. 425.
Honorary freemen, ii. 48.
Horne, Rev. J. case of, in the law societies, ii. 281.
Howell, his evidence, in Saltash, ii. 148, 152.
Houard sur les Coutumes Anglo-Norm. ii. 242.
Houghland, J. case of, in Bedfordshire, ii. 563.
Hughes, J. case of, in Bedfordshire, ii. 517.
Hume's History cited, i. 295—ii. 309.
Hundreds in county elections, proceedings by, ii. 386, 388, 389.
Huntingdonshire case in 1738, i. 454.
Hussey, W. case of, in Cricklade, ii. 511.

I.

Iackson, J. case of, in Bedfordshire, ii. 427.
Jacobs, W. case of, in Cricklade, ii. 538.
Identity of different voters of the same description, ii. 517.
Idcey objection to a voter, ii. 567.

I N D E X.

Ilchester, right of election in, i. 464.
Incapacity of members. See *Members*.
Incident, office to a lordship, i. 131.
Incumbrance, what, ii. 454, 455, 459, 460, 589.
Infancy, cases of, under the Assessment Act, ii. 528.
Infant, affected by laches of his trustee, i. 206, 211.
Inhabitants not incorporated, their capacity, i. 98. Described in returns, i. 8, 16—ii. 7, 8, 9.
Interest, in witnesses, i. 275, 384, 387.—ii. 405, 409, 410, 569.
Joint estate, assessment of, ii. 508.
Jones, Rev. R. case of, in Gloucestershire, ii. 500.
Journals, their authority as precedents, i. 14, 342, 349.
Joyce, Tho. case of, in Bedfordshire, ii. 329.
Ipswich, right of election in, i. 22.
Irons, W. case of, in Bedfordshire, ii. 429.
Judges, why excluded from the House of Commons, ii. 309.

K.

Kempe, W. case of, in Cricklade, ii. 539.
Kidman, T. case of, in Bedfordshire, ii. 446.
The King and Barker, case of, ii. 438.
 ——— *Bray*, case of, i. 279, 387, 389, 410, 411.
 ——— *Johnson*, case of, ii. 173.
 ——— *Robins*, case of, i. 279.
 ——— *Sparrow*, ii. 481.
King, W. case of, in Bucks, ii. 517.
Kingslon, Dutcheffs, case of, i. 338, 347.
Kirkudbright, case of, in 1782, i. 72.
Knighthood, could not be imposed on the clergy, ii. 288.

L.

Lane, Th. case of, in Bedfordshire, ii. 416.
Lawton and Lawton, case of, ii. 442, 580.
Lease and release, nature of that conveyance, i. 303, 305.
Legal, in the law of Scotland, i. 300.
 ——— estate distinguished from trust, i. 155—ii. 423.
Legg's burgages in Downton, i. 176.
Leigh, W. case of, in Bedfordshire, ii. 509.
Lewis and Price, case of, i. 139.
Leominster, case of, in 1717, i. 426.
Leonard and Earl of Suffex, case of, i. 150.
Leyfield's case, i. 316.
Lilly, J. case of, in Bedfordshire, ii. 522.
Limitations, statute of, i. 139, 141, 308—ii. 88, 89, 426, 427.
Lists of votes objected to, order for, i. pref. 30—ii. 382, 570, 573. Form of, 574, &c. Of votes rejected, ii. 390, 392, 575.

Littleton,

I N D E X.

Littleton, sect. 162, 163, cited, i. 180.
Liverpool, case of, in 1735, i. 427. freeman's oath, ii. 101.
De Lolme, cited, i. Pref. 20.
London, why called a corporation by prescription, i. 101. Modern alteration of the freeman's oath, ii. 98, 99.
Long, mayor of Westbury's case, i. 42.
Love, Th. case of, in Bedfordshire, ii. 417.
Lowe and Jolliffe, case of, i. 318.
Lugden, case of, in Bedfordshire, i. 356.
Lyme, right of election, ii. 4, 94. List of the members, 73.
Lyne, his evidence in Saltash, ii. 144.

M.

Magna Charta, 5th article of, ii. 119.
Mandamus, in the case of Dissenting Ministers, ii. 437.
Mansfield, Earl of, his opinion on the proposed bribery bill, i. 68.
 On the competency of witnesses, i. 410. On the Toleration Act, ii. 579.
Mantle, W. case of, in Bedfordshire, ii. 528.
Marriage, cases of, under the Assessment Act, ii. 529.
Marshall, Jos. case of, in Bedfordshire, ii. 440.
Matson, R. case of, in Bedfordshire, ii. 568.
Melcombe, right of election, ii. 82.
Members, how elected antiently, i. 293. Qualification of, i. 419. Standing orders of ditto, 420, 421, 450. Cannot be candidates for other seats, i. Pref. 29. Formerly incapacitated by absence or sickness, ii. 34.
 — petitioned against, dying, i. 456—ii. 607. Proceeding against *ex parte*, i. 442, 443, 444—ii. 608. Declining, ii. 608.
 — of election Committees, excused for sickness, ii. 254, 255.
Mereweather, H. case of, in Cricklade, ii. 512.
Merits of the election distinguished from the return, i. 327, &c. 452.
Mill, nature of property in, ii. 441, &c.
Milborn Port, case of, in 1708, i. 456. In 1775, i. 105. In 1781, ii. 532.
*Mixt*er of the church, who, ii. 283, 285, 286, 287, 300, 301, 304.
Misnomer on poll, ii. 586. See *Mistakes on poll* and *Name*.
Mistakes on poll, ii. 402, &c.
Mitchell, constitution of, i. 76, 97. Case of, in 1690, 65. In 1696, 456.
Morpeth, case of, in 1775, i. 405.
Mortgage, objection to a freeholder, ii. 451, 467, 468, 470, 471, 583, 584, 589.
Mortgagee, out of possession, has no vote, i. 161.
Mountain and Adkin, case of, i. 388, 409.

Munday,

I N D E X.

Munday, Ja. case of, in Cricklade, ii. 538.
Musgrave, J. case of, in Bedfordshire, ii. 514.
Myers, Ch. case of, in Bedfordshire, ii. 565.

N.

Name, rule of proceeding where two voters of the same, ii. 517.
 —, mistake in on rates how rectified, ii. 513, &c. 539.
 —, ditto on a poll, 402, 412, &c.
Naunton and Leman, case of, i. 209.
Netherfole, Rev. W. P. case of, in Bedfordshire, ii. 507.
Newark, case of, in *temp. Car. II.* ii. 226, 227, &c.
Nicholas, Jo. case of, in Downton, i. 223.
Nominees, institution of in election Committees, i. Pref. 21.
 Right of nominating waved, ii. 614.
Nowell, Dr. case of, in 1553, ii. 272, 290, 291.

O.

Oath, for the election Committee, i. 408. Of freemen of London, Lyme, Liverpool and Bristol, ii. 11, 48, 79, 98, &c.
 Of freeholders, ii. 445.
Objections, state of, in remarkable county contests, ii. 584, &c.
 See *Lists*.
Occasionality, i. 104, 105, 312, 313—ii. 42, 48, 353.
Occupation, right by, in boroughs, i. 80.
Odell, W. case of, in Bedfordshire, ii. 444.
Office, grant of ancient, i. 135. incident to lordship, i. 131.
 —, disqualifying, i. 455.
Oliver, J. case of, in Bedfordshire, ii. 414.
Order, standing, as to last resolutions, i. 6.
 —, as to double returns, i. 76.
 —, as to treating, i. 51, 69.
 —, as to election petitions, i. 401, 402, 403.
 —, for leave to petition, i. 398, 452.
 —, as to qualification by estate, i. 420, 439, 450.
Orders holy, the degrees and effect of, ii. 283, 286.
Ordination, forms of, ii. 284, 285, 286.
Oxfordshire, case of, in 1755, referred to, ii. 457, 565, 587.

P.

Paine, W. case of, in Bedfordshire, ii. 520.
Palmer, D. case of, in Bedfordshire, ii. 504.
Papist, no objection to a voter, ii. 567.
Paris, Matt. cited, ii. 288.
Parliament in 1784, when called, i. 31.
Peat and Ougly, case of, i. 239.

Pedder,

I N D E X.

- Pedder, R.* case of, in Bedfordshire, ii. 528.
Peers of Scotland in the House of Commons, ii. 275.
Petitioner may be candidate, i. Pref. 29. Contradistinguished from sitting member, i. 435, 436, 439. To give security for prosecuting, ii. 608. Not appearing, 613.
Petitions, vexatious, i. Pref. 23, 29—ii. 616. Renewed, ii. 134.
 — not opposed, ii. 613, 617.
 — in favour of a *sitting member*, i. 326—ii. 40.
 — to be subscribed, ii. 606. When may be withdrawn, ii. 611.
 — on right of election, or of returning officer, regulated, ii. 619, 622.
 — special reference of, i. 404, 405—ii. 41. Antient proceedings on, ii. 97. Arrangement of for trial, i. 324, 401, 404, 407.
Pike and Badmering, case of, i. 318.
Pincord, Ed. case of, in Bedfordshire, ii. 505.
Pinnegar, J. and B. case of, in Cricklade, ii. 537.
Poll, i. 319, 372.
Poll-book, distinguished from the poll, i. 329, 337, 338. Called a record, 333. Its authority, 338, 345, 346. Corrected by evidence, 327, 376, 378, 381, 383—ii. 403, 408, 412.
 —, evidence of votes tendered, i. 146.
Pontefract, constitution of, i. 8. Late contests there, 11.
Poole, case of, in 1769, i. 71.
Portmen, right of, in Ipswich, i. 22, 23.
Possession, right from length of, i. 137, 141, 144, 201, 207, 208, 221—ii. 46, 47, 89, 426.
 — adverse, what, i. 205, 207, 306—ii. 426.
 — for less than a year, gives no vote, ii. 427, 540.
Post-office, disqualification, ii. 558, 561, 562.
Præmunientes clause of the Convocation Writ, ii. 293.
Precedents, use of, in election Committees, i. Pref. 18.
Prerogative limited in both houses, ii. 232.
Preston, return in 1781, i. 16.
Price, W. case of, in Cricklade, ii. 538.
Priest, ordination of, ii. 285, 286. His office, *ibid.*
Privileges, Committee of, why so called, i. Pref. 28.
Proceeding, method of, in trials, i. 6, 116, 146, 147, 214, 215, 228, 377—ii. 336, 366, 386, 389, 392, 394, 600.
Proclamation of James II. for restoring charters, ii. 260.
Professors of the clergy, antiently sat in parliament, ii. 313, 318, &c.
Profert of deeds, effect of, i. 314.
Prosser's case, i. 306.

Q.

- Quaker*, sworn as a witness, i. 28.
Qualification of members, i. 416, 449. Must be expressly objected to in the petition, 433, 440. See *Members*.

I N D E X.

R.

- Rate* for the poor, when occasional, i. 104, 105.
Reanes, Jane, her evidence in Saltash, ii. 140, 150.
Recognizance of petitioners, ii. 609, 612. Form of, 623.
Reed, J. his evidence, *ibid.* 139, 150.
Registers for Yorkshire, how elected, ii. 455.
Register of freeholders, statute for, ii. 396, 578.
Rentcharge, ii. 428, 429, 431.
Rents and Charges, what are, ii. 454, 455, 459, 460.
Reports to the House from Committees, i. 264, 317, 470—ii. 225, 254, 369, 370, 397, 612.
Representation, origin and right of, i. 98—ii. 181.
Reprises, what, ii. 455.
Resiant roll, evidence of, in Lyme, ii. 13, 14, 64.
Residence, a qualification of the right of voting, ii. 46, 93.
 —, old statutes relating to, 482, 490.
Resolution, special, of Committees, i. 317—ii. 370, 616.
Return, distinguished from the merits, i. Pref. 15.—i. 283, 328, 329, 335, 342, 343, 404, 405.
 —, double, i. 75, 76, 109. How amended, i. 126.
Returning officer, i. 37, 53, 61, 145—ii. 41, 339, 350.
 — action against for refusing votes, ii. 245.
 — report against, ii. 370, 376.
Returns, i. 7, 15, 120, 121—ii. 8, 9, 27, 50, 51, 75, 76, 193, 132, &c. 158. Curious for Aylebury, ii. 97.
Reversioner, mutual relation between, and the termor, ii. 581.
Reynolds, Rev. D. case of, in Bedfordshire, ii. 420.
Richards and Brown, case of, i. 341.
Right distinguished from possession, i. Pref. 15. i. 336.
Rolle, Chief Justice, quoted on corporations, ii. 179, 236.
Rutlandshire, case in 1711. ii. 572.
Ryman, Ed. case of, in Bucks, ii. 517.

S.

- Safford, S.* case of, in Bedfordshire, ii. 519.
Saltash, case of, ii. 107, 205. List of its members, 234.
Sargent and Miltward, case of, ii. 248.
Saunders, W. case of, in Bedfordshire, ii. 412.
 —, *Rob.* ditto, ii. 427.
Schoolmaster's freehold, ii. 428, 429, 430, 431, 497, 501, 502, 585, 587.
Scot and lot, right of, i. 80.
Scotland, ancient election laws of, i. 299.
Scott, W. case of, in Downton, i. 250.
Seal, (common) its effect, ii. 72, 93, 182, 199, 238.
Shadbrook, R. case of, in Bedfordshire, ii. 502.
Shafisbury, case of, in 1717, i. 458.
Shepherd, Th. case of, in Bedfordshire, ii. 541.

Sheriff,

I N D E X.

Sheriff, his power and duty in elections, i. 365, 393.
Shoreham, case of the returning officer, ii. 376.
Shrewsbury, case of, in 1774, i. 456.
Smith, *J^a*. case of, in Bedfordshire, ii. 410, 424.
 —, *H.* ditto, *ibid.* 508.
 —, *Wm.* ditto, *ibid.* 540.
Southwark Committee in 1785, their resolutions, ii. 573.
Southwell, *Jⁿ*. case of, in Bedfordshire, ii. 447.
Stamp on deeds, i. 252, 263, 314.
 — acts, i. 311, 312, 314.
 — office, disqualification, ii. 552, &c.
Stanyan, *R.* case of, in Bedfordshire, ii. 531.
St. Ives, case of, in 1775, i. 458.
Stillington, his opinion on the ecclesiastical law, ii. 279.
Stockbridge, case of, in 1689, i. 65. In 1693, i. 67.
Stockman's charity in Downton, i. 194.
Strange, *R.* case of, in Cricklade, ii. 567.
Stringer, *R.* case of, in Bedfordshire, ii. 450.
Surrender of a charter, form of, ii. 258.
Survey, antient of, Saltash, ii. 123.

T.

Tansley, *J.* case of, in Bedfordshire, ii. 525.
Taxes of the clergy, how imposed, ii. 275, 277, 279, 295, 296.
 Change therein, 309.
 —, their effect on freehold votes, ii. 471, &c.
Taylor, *J^a* case of, in Bedfordshire, ii. 408.
 —, *R.* ditto, ii. 428.
Tecseira and Evans, case of, i. 240.
Tender, plea of, i. 305.
 — of vote, ii. 569. See *Evidence*.
Termor and Reversioner, mutual relation, ii. 581.
Third persons, i. 237, 244.
Thomas, *S.* case of, in Gloucestershire, ii. 436.
Thompson, evidence of, in Saltash, ii. 143.
 —, *Rev. J.* case of, in Bedfordshire, ii. 502.
Threats, objection: to a vote by, ii. 587.
Toleration, Act of, ii. 434, 436, 579, 580.
Treating Act, and standing order of, i. 69.
Trelawney and Bishop of Winchester, case of, i. 134.
Trotman, *J.* case of, in Bedfordshire, ii. 431.
Trust, nature of, i. 295, 296, 301, 302.
 —, estate, i. 148, 167—ii. 422, 424, 508.
Trustee, i. 151, 155, 156, 157, 259.
 — not intitled to vote, i. 161.
Turner, *P.* case of, in Bedfordshire, ii. 431.

Union,

I N D E X.

U.

Union, operation of, on the number of members, ii. 228, 233.
Uses and Trusts, i. 301, 302.

V.

Value of freeholds, how ascertained, ii. 448, 450.
 — reduced by charges and taxes, ii. 450, 471.
Vernon, J. case of, in Bedfordshire, ii. 523.
Vexatious parties, to pay costs, ii. 616.
Vial, his evidence in Saltsb, ii. 207.
Vicarage and *Vicar*, votes of, ii. 516, 518, 585, 587.
Vote, thrown away, i. 72, 446, 455—ii. 271.
 —, acquired after the election began, ii. 427.
Voter, rejected as witness, i. 392. Allowed, ii. 405, 410, 411, 569.

W.

Wachfell, Dr. case of, ii. 437, 439.
Wadsetter, i. 300.
Wages of members, ii. 37, 78.
Wagstaffe, H. case of, in Bedfordshire, ii. 519.
Ward, W. case of, in Bedfordshire, ii. 521.
Webb, J. case of, in Downton, i. 231.
West, his Inquiry cited, ii. 228.
Westbury, right of election, i. 196.
Westminster return in 1784, i. Pref. 24.
Wetherell and Hall, case of, ii. 461, 462, 588.
Weymouth, right of election, ii. 82. Case of in 1730, i. 429, 437, 451, 454.
Whadley, Rev. Ed. case of, in Bedfordshire, ii. 506.
White, F. case of, *ibid.* ii. 521.
White horse, votes in Downton, i. 173, 174.
Whittall, T. case of, in Bedfordshire, ii. 524.
Wigfall and Brydon, case of, i. 213.
Willan, Rev. R. case of, in Bedfordshire, ii. 510.
Wilson, J. case of, in Bedfordshire, ii. 562.
Wiltshire, M. case of, in Downton, i. 199.
Windmill, freehold in, ii. 440, 444.
Windsor, returns for, i. 16.
Withy, T. a witness in Ilchester, i. 470.
Witness, competence and credit of, i. 267, 272, 273, 275, 384, 387, 389, 392.—ii. 405, 410, 569. Attesting to be *first* called, i. 271.
 — committed for prevaricating, i. 470. May be by the Committee, ii. 614.

Witness

I N D E X.

Witness taken ill, i. 280.
Wittenstal, Ja. case of, in Bedfordshire, ii. 508.
Wootton-Basset, case of, in 1690, i. 66.
Worcester, case of, in 1773, ii. 533, 534.
Writ for the Convocation, ii. 276, 277.
Wyat, W. case of, in Bucks, ii. 517.
Wyche, and East India Company, case of, i. 211.

Y.

Yorkshire, case of, in 1736, referred to, ii. 457, 565, 570.
General state of, 586.

THE END OF THE SECOND VOLUME.

I. N. D. N. X.

Wanted taken in 1863.
Wanted taken in 1863.
Wanted taken in 1863.
Wanted taken in 1863.
Wanted taken in 1863.
Wanted taken in 1863.
Wanted taken in 1863.
Wanted taken in 1863.
Wanted taken in 1863.
Wanted taken in 1863.



General list of books in the Library of Congress.

THE END OF THE SECOND VOLUME

